The Position of Mentally Disordered Suspects and Offenders across Europe and the Implications for European Cooperation

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UNIVERSITEIT GENT

Thesis submitted in fulfilment of the requirement
for the degree of Doctor of in Law

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Dutch translation of the title:

De positie van verdachten en veroordeelden met een psychiatrische problematiek in Europa en de gevolgen voor de Europese samenwerking in strafzaken

Abstract (English)

This research had the purpose of taking the measure of the current (and future) arsenal of instruments within the European Area of Freedom, Security and Justice (AFSJ) that focus on European cooperation in criminal matters. For this, a selection of the relevant instruments of cooperation based on the principle of mutual recognition in criminal matters was made. This objective was then approached from the perspective of mentally disordered suspects or offenders. Starting from a dual focus - 1. the position of such suspects and offenders in these procedures and the consequences for them, and 2. the possible problems related to such persons for the instruments of mutual recognition and the consequences for an efficient and equitable cooperation - this study seeks to make both an actual (and previously unexplored) contribution to the existing legal doctrine on mutual cooperation in criminal matters, as well as build a bridge between the research fields of legal science criminology and forensic sciences. On the basis of an analysis of the relevant instruments stretching over the pre-trial, trial and post-trial phase, opportunities and problems were enumerated. In addition, attention was also paid to the broader themes of the AFSJ: the difficult relationship between fundamental (human) rights and the principles of mutual recognition, the relationship between mutual recognition and harmonization within the European criminal policy and the competence debate of the European institutions were treated and discussed through a link on the position of an accused or convicted person with psychiatric problems. Based on the results of this research, recommendations were formulated in order to improve the situation of these vulnerable persons involved, and better the cooperation in criminal matters within the European Union.

Abstract (Nederlands)

Dit onderzoek had tot doelstelling de maat te nemen van het huidige (en toekomstige) arsenaal aan instrumenten binnen de Europese Ruimte van Vrijheid, Veiligheid en Recht (ERVVR) dat zich richt op de Europese samenwerking in strafzaken. Concreet werd een selectie gemaakt van de samenwerkingsinstrumenten gebaseerd op het principe van de wederzijdse erkenning in strafzaken. Deze doelstelling werd vervolgens benaderd vanuit het oogpunt van verdachten of veroordeelden met een psychiatrische problematiek. Vertrekkende vanuit een dubbele focus – 1. de positie van dergelijke verdachten en veroordeelden binnen deze procedures en de gevolgen voor hen, en 2. de mogelijke problemen m.b.t. dergelijke personen voor de instrumenten van de wederzijdse erkenning en de gevolgen voor een efficiënte en rechtvaardige samenwerking – tracht dit onderzoek zowel een actuele (en voorheen onontgonnen) bijdrage te leveren aan de literatuur rond de wederzijdse samenwerking in strafzaken, alsmede een brug te slaan tussen de onderzoeksdomeinen van het recht, criminologie en forensische wetenschappen. Aan de hand van een analyse van de relevante instrumenten in zowel een pre-processuele fase, procesfase en strafuitvoeringsfase werden de opportuniteiten en problemen opgesomd. Daarnaast werd ook aandacht besteed aan de bredere thema's waarmee geworsteld wordt binnen de ERVVR: de moeilijke verhouding tussen fundamentele (mensen)rechten en de principes van de wederzijdse erkenning, de relatie tussen wederzijdse erkenning en harmonisatie binnen het Europese Strafrecht en de competentie-perikelen van de Europese instellingen werden behandeld en besproken via een link aan de positie van een verdachte of veroordeelde met een psychiatrische problematiek. Gebaseerd op de resultaten van dit onderzoek werden tot slot aanbevelingen geformuleerd teneinde zowel de positie van deze kwetsbare betrokkenen, als de samenwerking in strafzaken binnen de Unie te verbeteren.

Preface

As the cliché goes, writing a PhD is lonely experience. While it is true that the bulk of the job entails long hours bent over all kinds of documentation with the welcome change of pace of long hours bent over your computer keyboard, I never found myself to be alone. For this, I need to thank a number of people:

My parents and my brother, for supporting me in everything I did and do, the importance of having a warm family to return to cannot be measured.

My friends and loved ones, for being there for me always. The past couple of years have often been characterised by my absence, but all the moments I was able to be present I cherished.

My nephews and the boys from the band, for reminding me that, sometimes, there is something else in life than researching European criminal law.

My colleagues at the IRCP, I want to thank you all for sharing the experience with me, being there for a quick chat or a laugh and to discuss my research. All of you have turned into dear friends.

My supervisor Gert Vermeulen & co-supervisor Tom Vander Beken, I am very grateful for your confidence in me and your continuous support. Thank you for all the opportunities you gave me.

I want to thank Frank Verbruggen for his kind membership and welcome support in my doctoral guidance committee.

With hindsight, getting and raising a small fox terrier almost simultaneously with the start of my PhD research may not have been my brightest of ideas, but what a glorious little mistake you turned out to be, Bobbie.

Ghent, April 3, 2016.

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I. Introduction

Individuals trapped in criminal proceedings whilst affected by a mental disorder cannot, by international consensus, be accumulated with regular suspects and offenders and form a particularly vulnerable group. Individuals whose free will is affected by a mental disorder should not be prosecuted and penalised similar to an unaffected person because they are not – and depending on the severity and origin of the disorder; may never be – a proper addressee of the law. [1] Hence, their mental status needs specific attention in order to guarantee the fairness of the (criminal or otherwise) proceedings. This attention implies a just and qualitative assessment of the individual's (criminal) responsibility and/or accountability. Furthermore, such an establishment needs to result in appropriate safeguards for their right to adequate care and treatment during and following criminal proceedings.

In order to guarantee all of the above, prompt and adequate identification of a person's affected mental state is needed to safeguard his (procedural) rights and enable him to *effectively participate* in the proceedings held against him.[2] This effective participation is relevant not just during the actual trial, but also implies the application of addition safeguards during the investigative phase.[3] The involvement of mentally disordered suspects and their need for protective measures in the realm of the gathering and collection of evidence means that this vulnerability needs to be taken into account and acted upon accordingly.

Moreover, once a person involved in criminal proceedings has been identified as vulnerable due to a mental impairment, a fair balance has to be struck between the protection of society on the one hand and the provision of care and treatment for the individual on the other. Based on the principle of *normalization* (or equivalence of care) a mentally impaired individual legally deprived of his liberty (be it imprisonment or any other form of placement or detention) has the right to care and treatment equivalent in quality to that provided for the general public in

[1] *H.J. Salize & H. Dressing* (eds.), Placement and Treatment of Mentally Disordered Offenders - Legislation and Practice in the European Union, Mannheim: Central Institute of Mental Health, Pabst Science Publishers, 2005, p. 15; *A. Ashworth*, Principles of Criminal Law. Oxford University Press, 2006*; J. Blomsma & D. Roef*, Justifications and excuses, in: J. Keiler & D. Roef (eds.), Comparative concepts of criminal law, Intersentia Cambridge, UK, 2015, p. 166.

[2] United Nations (2006). Article 13 of the United Nations Convention on the Rights of Persons with Disabilities.

[3] Council of Europe: Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right of defendants to participate effectively in criminal proceedings from the earliest stage of police interrogation. See also Panovits v. Cyprus, Application no. 4268/04, Judgement 11 December 2008.

the same country.[4] Both in a pre-trial and post-trial phase, this is a positive obligation for the EU member states to provide adequate health care services, but also implies a difficult equilibration between the need for treatment for the individual and the duty to provide protection to the outside world.

This balancing exercise is also reflected in the assessment and evaluation of that person's criminal accountability. Individuals whose free will is affected by a mental illness are not to be punished by classic penal law reasoning, but should be diverted outside of a (strict) criminal accountability evaluation because their guilt for the acts committed may not be fully established, or sometimes not at all. It is up to the legal systems of the EU member states to find a poise between a just reprimand and an adequate treatment. An important element in this equation is the aforementioned protection of society and satisfactory remediation for the victims and/or their next of kin.

In this research, all these findings are analysed in the evolving European context of free movement of persons. The ever increasing mobility in the EU implies that more and more people are getting involved in criminal proceedings with a cross-border dimension. Not just criminal proceedings in a member state other than that of their habitual residence and/or nationality, but also proceedings that involve investigative and/or prosecutorial acts as well as acts of sentence enforcement and execution in multiple member states.

As a result hereof, a variety of different sets of rules qualify to be applicable. Since the Tampere Milestones in 1999[5], the principle of mutual recognition was established as the cornerstone for future cooperation in criminal matters, and its subsequent framework of instruments has been rolled out. This framework increasingly aims to regulate cross-border situations to effectuate smooth cooperation between the various legal systems while enhancing the fundamental rights

[4] United Nations (1966). Article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights (UN ICESCR). This covenant is binding upon the UN member states; Council of Europe: Article 40 of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (the European Prison Rules); Articles 10, 11, 12, 19 and 52 of the Recommendation R(98)7 concerning the Ethical and Organisational Aspects of Health Care in Prison; Article 35 of the Recommendation R(2004)10 concerning the Protection of the Human Rights and Dignity of persons with Mental Disorders; CPT standards - Health care services in prisons, 31 and 38; CPT standards - Involuntary placement in psychiatric establishments, 32; United Nations: article 22 of the Standard Minimum Rules for the Treatment of Prisoners; article 1 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 1 and 20 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. See also: R. Lines, From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons, International Journal of Prisoner Health (IJPH), 2(4), 2006, pp. 269-280.

[5] European Council (1999). Tampere European Council Presidency Conclusions.

of the individuals involved.[6] The foundation for this philosophy is the mutual trust the member states can attribute to each other's legal systems and the quality of their standards and norms, through the existing diversity, because of their enduring commitment to fundamental rights and the rule of law.[7] The mutual recognition philosophy has been characterized since its inception, however, by critique on the EU's criminal justice policy's emphasis on the simplification and acceleration of police and judicial cooperation without consideration for setting an acceptable standard for fundamental rights of the individuals involved.[8] Moreover, practitioners, scholars and policy makers alike were consistently and increasingly confronted with indications of breeched fundamental rights, be it via domestic procedures or from recurrent case law of the European Court of Human Rights and Court of Justice of the EU.

Within this context, suspects and offenders with a mental disorder form a particular population. Vulnerable due to the nature of their mental capacity/disability, the required additional protection is provided for under the National laws of the member states' legal systems but remains largely omitted in the provisions of the mutual recognition instruments precisely because of the assumed trust in the member states' compliance with the applicable international norms and standards. In view of the principle of mutual recognition's own double purpose of enhancing both cross-border cooperation in criminal matters in the EU and the rights of the individuals involved, and confronted with indications of breaches of fundamental rights, this raises the question as to the specific position of mentally disordered suspects and offenders both in terms of guaranteeing a feasible and effective cooperation as well as the safeguarding of their fundamental rights.

[6] Conclusions 33 and 35 respectively mention facilitation of the judicial protection of individual rights and that the principle of fair trial should not be prejudiced by fast track extradition procedures. Conclusion 40 points out that it seeks to develop measures against crime while protecting freedoms and legal rights of individuals.

[7] *Council of the European Union*, Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, 15.01.2001, 2001. Its preamble, para. 6 of the clearly states "That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law".

[8] *S. Peers*, EU Justice and Home Affairs Law, Harlow: Pearson Education, 2000; *K. Ambos*, Mutual recognition versus procedural guarantees? In M. de Hoyos Sancho (Ed.), Criminal proceedings in the European Union: essential safeguards, Lex Nova, 2008, pp. 25-38; *M. Anderson*, Law enforcement cooperation in the EU and fundamental rights protection, in: M. Martin (Ed.), Crime, rights and the EU: the future of police and judicial cooperation, London: Justice, 2008, pp. 105-120; *E. Cape, J. Hodgson, T. Prakken & T. Spronken*, Suspects in Europe, procedural rights at the investigative stage of the criminal process in the European Union (1 ed. Vol. 64), 2007; *G. Vermeulen*, Mutual Recognition, harmonisation and fundamental (procedural) rights protection, in: M. Martin (Ed.), Crime, rights and the EU: the future of police and judicial cooperation, London: Justice, 2008, pp. 89-104; *G. Vermeulen & L. van Puyenbroeck*, Towards minimum procedural guarantees for the defence in criminal proceedings in the EU. International and Comparative Law Quarterly (ICLQ), 60(04), 2011, pp. 1017-1038. See infra as well.

In this respect, this research bridges the gap between the large amalgam of studies[9] that have analysed the approach of the EU member states' criminal procedures vis-à-vis the mentally disordered in a national context – departing often from a forensic-psychiatric and/or medico-legal approach – and the research that has developed since the Tampere Milestones inception, dealing specifically with the principle of mutual recognition in cooperation in criminal matters.

These findings are then substantiated by the research on the European Court of Human Rights' and Court of Justice of the European Union's case law, to indicate both the potential and effective detrimental implications for the persons involved. Following this establishment, the research links back to the cross-border, mutual recognition context, where it exposes the possible clash between the mutual recognition instruments and the existing divergent and substandard (legal) systems in the EU, but also identifies the opportunities provided in the instruments to better cooperation while enhancing the individuals' position.

As such, the research conducted attempts to provide both a novel – in the way that it combines different fields of research in terms of the situation for mentally disordered individuals across the EU which often have a medico-legal finality, with the legal doctrine vis-à-vis the instruments of mutual recognition in the European Area of Freedom, Security and Justice (AFSJ) – and a timely – in that it incorporates very recent developments in the AFSJ like the 2013 Commission Recommendation while also putting the finger on the flaws of the mutual recognition instruments with a particular focus on the mentally disordered individuals involved – contribution to the field of legal research on European cooperation in criminal matters.

[9] *H. Dressing, H.J. Salize & H. Gordon*, Legal Frameworks and key concepts regulating diversion and treatment of mentally disordered offenders in European Union member states, European Psychiatry (EP),22(7), 2007, pp. 427-432; *H. Dressing & H.J. Salize*, Forensic psychiatric assessment in European Union member states, ActaPsychiatricaScandinavica (APS), 114, 2006, pp. 282–289; *E. Blaauw, R. Roesch & A. Kerkhof*, Mental disorders in European prison systems: arrangements for mentally disordered prisoners in the prison systems of 13 European Countries, International Journal of Law and Psychiatry (IJLP),23 (5-6), 2000, pp. 649-663; *H.J. Salize, H. Dreßing, & C. Kief,* Mentally Disordered Persons in European Prison Systems-Needs, Programmes and Outcome (EUPRIS), 2007. Retrieved via: http://ec.europa.eu/health/ph_projects/2004/action1/docs/action1_2004_frep_17_en.pdf. A recent report of Fair Trials International – following research on the protection of fair trial rights across the EU – indicated that "there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or those who are otherwise vulnerable, understand the proceedings in which they are involved are treated fairly". See: *Fair Trials International*, Defence Rights in the EU, 2012. Retrieved via: http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf.

II. Setting the scene

Despite the conferred cornerstone notion (see supra) and its characterisation as a fundamental change in European criminal policy making[10] , the principle of mutual recognition was far from new when it was brought up at the end of the twentieth century. The advent of the internal market and abolition of internal EU borders through Schengen[11] had already sparked the discussion on rethinking criminal justice in the European Union to provide an adequate answer to the rising *multilateralism* of criminality.[12] With the Treaty of Amsterdam signed on the 2nd of October 1997 [13] these sentiments were given a policy dimension by changing the approach towards judicial cooperation. Setting forth the creation of an Area of freedom, security and justice (AFSJ), this has since been labelled as one of the most far-reaching constitutional developments in EU law.[14] In its article 29[15], the Treaty drew heavily on the internal market principles of the European Community and promoted the idea of eliminating the still existent borders for criminal justice.

The first step towards applying the mutual recognition principle as the weapon of choice to achieve this AFSJ, was taken in 1998. The concept was launched by Mr. Jack Straw, then Home

[10] *I. Bantekas*, The Principle of Mutual Recognition in EU Criminal Law, European Law Review (ELR), 32(3), 2007, pp. 365-385; *V. Mitsilegas*, The constitutional implications of mutual recognition in criminal matters in the EU, Common Market Law Review (CMLR), 43, 2006, pp. 1277-1311; Vermeulen,2008 (fn. 8).

[11] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22/09/200, 1985.

[12] *H.G. Nilss*on, From classical judicial cooperation to mutual recognition, Revue Internationale de droit penal (RIDP), 77(1), 2006, pp. 53-58.

[13] Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing The European Communities and Certain Related Acts, *OJ C 340* 10 November 1997.

[14] *V. Mitsilegas*, The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights, General Report, in: J. Laffranque (Ed.), The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn, vol. 3, 2012, pp. 21-142.

[15] "Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:
- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;
- closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;
- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

Secretary to the UK, during the UK Presidency of the Cardiff European Council in 1998.[16] At the time of pitching of the idea, most specialists considered that there was no immediate need for a new concept in the field of cooperation within the area of freedom, security and justice as already a number of instruments were available that incorporated some of the principle of mutual recognition's features. The Council of the Europe Convention of 1970 concerning the International Validity of Criminal Judgements[17], the Council of Europe Convention of 1972 concerning the Transfer of Proceedings[18], the Vienna Convention (1998) on Driving Disqualifications[19] and the Convention of 13 November 1991 between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences[20] served as samples of such instruments. The counterargument consisted therefore in proclaiming the need for (better) ratification of the already existing instruments, rather than creating a new set based on the novel proposal by the UK.

Apart from this, the concept of mutual recognition was already well embedded in European law as it served as a prominent principle in internal market law.[21] Bearing in mind the far reaching consequences of the concept in the internal market area, many a member state was hesitant to straightforwardly allow such a notion within the area of criminal law traditionally sensitive to sovereignty matters. Notwithstanding this initial hesitance, the expressed notion that the existing instrumentarium was lacking in effectiveness due to a multitude of factors[22] was broadly carried by most of the participants.

[16] See, inter alia: Nilsson, RIDP 2006 (fn. 12); Bantekas, ELR 2007 (fn. 10); *L. Harris*, Mutual Recognition from a practical point of view: cosmetic or radical change?, in: G. De Kerkhove & A. Weyembergh (Eds.), L'espace penal européen: enjeux et perspectives, Brussels: Eds. Université de Bruxelles, 2002, pp. 105-111.
[17] *Council of Europe*, European Convention on the International Validity of Criminal Judgments, 1970.
[18] *Council of Europe*, European Convention on the Transfer of Proceedings in Criminal Matters, 1972.
[19] *Council of the European Union*, Council Act of 17 June 1998 Drawing up the Convention on Driving Disqualifications, OJ C 2016n 10.07.1998.
[20] Convention Between The Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, 13.11.1991.
[21] *M. Möstl*, Preconditions and Limits of Mutual Recognition, Common Market Law Review (CMLR), 47(2), 2010, pp. 405-436.
[22] Among which the poor ratification status of the example instruments was one. Many participants indicated the complexity of these instruments as their reason for untimely or non-ratification. Furthermore the frustration with the cumbersome and formality-prone characteristics of traditional judicial cooperation was identified. See, i.a.: *G. Vermeulen*, Where do we currently stand with harmonisation in Europe?, in: A. Klop & H. Vander Wilt (Eds.), Harmonisation and harmonising measures in criminal law, Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002, p. 65-77.

Following their Cardiff nascence, and after further expression of the will to "open a new dimension for action in the field of Justice and Home Affairs" at the Vienna summit[23], the UK Presidency's ideas were picked up again at the time of the preparations for the European Council special meeting at Tampere in October 1999. By this time, the Treaty of Amsterdam had entered into force[24] enabling the discussion on how to effectuate the set Area of Freedom, Security and Justice. In their Action Plan of the 3rd of December 1998 on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice[25], the Council and the Commission had already provided under point 45(f) that within two years of the entry into force of the Treaty, a process should be initiated with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters.[26]

Simultaneously, there was the ever increasing annoyance by practitioners and interest groups alike regarding classic judicial cooperation in criminal matters: the intermediate exequatur and conversion procedures undermined smooth and swift cooperation, while allowing for lengthy procedures (e.g. and especially relevant in the area of extradition) without consideration for the persons – both victims, suspects and offenders – involved. This apparent coalescence of the political agenda with the lamentations coming from practice and doctrine enabled the resurgence of the MR concept and the Council Secretariat started to consider in depth the potential impact of the principle during the Tampere Council preparatory period.[27]

At Tampere, mutual recognition was ultimately laid down by the European Council in its presidency conclusions as the (future) cornerstone for judicial cooperation in civil and criminal matters.[28] In order to effectuate the concept, informal discussions were held on its practical

[23] Vienna European Council Presidency Conclusions, 11 & 12 December 1998. In paragraph 83, the Council states that "The European Council endorses the Action Plan drawn up by the Council and the Commission on establishing an area of freedom, security and justice, which opens a new dimension for action in the field of Justice and Home Affairs after the entry into force of the Amsterdam Treaty and which sets a concrete framework for the development of activities in these fields. It urges the Council to start immediately with the implementation of the 2-year priorities defined in this Action Plan."
[24] On the 1st of May 1999.
[25] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - Text adopted by the Justice and Home Affairs Council of 3 December 1998, *Official Journal C 019 , 23.01.1999*.
[26] Point 45 (f) of the Action Plan. See also: Harris, 2002 (fn. 16), p. 107.
[27] *H.G. Nilsson*, Mutual Trust or mutual mistrust?, in: G. De Kerkhove & A. Weyemberg (Eds.), La confiance mutuelle dans l'espace penal européen; Mutual trust in the European criminal area, Brussels: Ed. De L'université de Bruxelles, 2005, pp. 29-40; Nilsson, RIDP 2006 (fn. 12), pp. 56-57.
[28] *European Council*, Tampere European Council Presidency Conclusions, 1999.

rendering during the Portuguese Presidency before – under the French Presidency – a programme of measures[29] was drafted in January 2000 that was to become the action plan in the pursuance of the principle.[30] Following the plan's well-structured and thorough 24 measures, the European Commission then announced a series of measures to implement the principle[31] and released a Commission Communication in 2000 to draw its further elaboration.[32]

The purpose of the mutual recognition principle was clarified in Conclusion 33 of the Tampere Milestone, which formulated that "Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities. "[33]

As such, and notwithstanding its reiteration in subsequent instruments and citation at *countless occasions*[34], the importance of this paragraph bears repeating: the Tampere Milestone makes it absolutely clear that mutual recognition follows a strictly identified two-way path: the facilitation of judicial cooperation and the – enhanced – protection of individual rights.

The bedrock for this enhanced cooperation and protection was clarified by the 2000 Programme of Measures, stating that "Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. That trust is grounded, in particular, on their shared commitment to

[29] *Council of the European Union*, Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C12/10, 2001.
[30] Nilsson, 2005 (fn. 27), p. 31.
[31] *C. Morgan*, The Potential of Mutual Recognition as a leading policy principle, in: C. Fijnaut & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union, The Netherlands, Leiden: Koninklijke Brill NV, 2010, p. 231-239.
[32] *European Commission*, Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM/2000/0495 final, 29.07.2000.
[33] Conclusion 33 of the Tampere Milestones.
[34] *G. Vermeulen & W. De Bondt*, First things first: Characterising mutual recognition in criminal matters, in: B. De Ruyver, T. Vander Beken, F. Vander Laenen & G. Vermeulen (Eds.), EU criminal justice, financial & economic crime : new perspectives interest-based dispute resolution, vol. 5, Antwerpen: Maklu, 2011, p. 17-38.

the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law."[35]

Quickly thereafter, in a Commission Communication of the 26th of July 2000 to the Council and the European Parliament, the Commission elaborated further on the subject by stating that "Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are acceptable as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners' rules, but also trust that these rules are correctly applied. Based on the idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state or could not take such decisions, or would have taken an entirely different decision in a comparable case."[36]

As such, mutual recognition is based on a common and reciprocal mutual trust between the member states that their criminal justice systems, and the (judicial) decisions resulting thereof, are firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law.[37] As a result of this, the states may rely on foreign decisions in criminal matters, execute them without further requirements or verification (enhanced cooperation) while remaining confident that fundamental rights and substantive and procedural criminal law standards are maintained (enhanced judicial protection). The aim and purpose of mutual recognition is that in an Area of Freedom, Security and Justice, judicial decisions should circulate freely from one member state to another and be treated as equivalent.[38]

[35] Preamble, para. 6 of the Programme of Measures.
[36] Point 3.1, paragraphs 1 & 2 of the Commission Communication. European Commission, Communication from the Commission to the Council and the European Parliament – Mutual Recognition of final decisions in criminal matters, COM/2000/0495 final, 29.07.2000.
[37] See, analogously, Conclusion 1 of the Tampere Milestones.
[38] Morgan, 2010 (fn. 31), p. 232.

In 2002, the Framework Decision for the European Arrest Warrant and surrender procedures between Member States (FD EAW) marked the baptism of the first[39] instrument to see the principle of mutual recognition fully put into place.[40] The maiden voyage of the European Arrest Warrant was characterised by some major hurdles that, with a touch of hindsight, were indicative for the challenges of the mutual recognition instruments to come.[41]

Nonetheless, Tampere's successor the Hague Programme[42], setting the EU's agenda for justice and home affairs from 2005 until 2009, stated in paragraph three of its introduction that "the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgments has been well advanced" and reconfirms "the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions."[43]

Over the years, the principle resulted in a number of instruments aimed at effectuating full mutual recognition of (certain) decisions in criminal matters within the EU[44] and ever since, it

[39] This *pioneer* notion is indicated in the instrument itself, where its preamble (recital 6) states that the EAW "is the first concrete measure in the field of criminal law implementing the principle of mutual recognition".

[40] *S. Alegre*, Mutual trust - Lifting the mask, in: G. De Kerkhove & A. Weyemberg (eds.), La Confiance Mutuelle dans l'Espace Penal Europeen; Mutual trust in the European criminal area, Brussels: Eds. de l'Universite de Bruxelles, 2005, pp. 41-45; *S. Alegre & M. Leaf*, Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant , European Law Journal (ELJ), 10(02),2004, p. 200-217.

[41] Constitutional challenges vis-à-vis the surrender of country nationals, (untimely) implementation issues, dual criminal abolition issues, creation by the member states of refusal grounds based on fundamental rights provisions contra to the MR philosophy. See as an example: *Council of the European Union*, Follow-up of the mutual recognition instruments - Note from the Incoming Belgian Presidency to the Working Party on Cooperation in Criminal Matters (COPEN), Brussels, 11193/10, 17.6.2010. Apart from these worrisome signals coming from the member states, policy makers, practitioners and scholars alike expressed concerns regarding some of the instruments' features. See: Alegre & Leaf, ELJ 2004 (fn. 40); *M. Fichera*, The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?, European Law Journal (ELJ), 15(01), 2009, 70-97; Mitsilegas, CMLR 2006 (fn. 10); Bantekas, ELR 2007 (fn. 10); Vermeulen, 2008 (fn. 8); *A. Suominen*, Different Implementations of Mutual Recognition Framework Decisions, eucrim (The European Criminal Law Associations´Forum) 1, 2011,pp. 24-27.

[42] *European Council*, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ 2005/C 53/01, 2004.

[43] Point 3.3.1, 2nd paragraph, The Hague Programme.

[44] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190 18.07.2002 ; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 02. 08. 2003; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties OJ L 76 22.03.2005; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328 24.11.2006; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220 15.08.2008; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the

has fulfilled the role of catalyst in the development of harmonisation of the criminal law of the EU member states.[45] As has rightly been identified by critical observers, the majority of these instruments and the practice of the EU in the field of policy making in criminal matters in general has however been predominantly aimed at a repressive and prosecution-oriented approach.[46] This allows for some serious doubt regarding its full objective of enhancing the protection of individual rights. Moreover, the presupposition of mutual trust as the quintessential element for smooth mutual recognition and enhanced cooperation is under fire from both the legal doctrine and flawed day-to-day practical appliance.[47]

As such, the status of mutual recognition as the guiding principle for judicial cooperation in criminal matters seems to be at a crossroads. On the one hand the EU seems determined to further develop the principle by formally embedding it with a treaty basis. With the Lisbon Reform Treaty[48], the principle was given a proper treaty basis – well over a decade since its first emergence – in article 82 (1) of the Treaty on the Functioning of the European Union (TFEU)[49], reaffirming the mutual recognition concept as the primary foundation for judicial cooperation in criminal matters.

A similar, but more prudent[50] reaffirmation of the faith in the principle was expressed by the Stockholm Programme[51] as the follow-up to the Hague agenda for 2010-2014 enabling an open and secure Europe serving and protecting the citizen. The European Council stated, not

European Union, OJ L 327 05.12.2008; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L 337 16.12.2008; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters OJ L 350 30.12.2008.

[45] *G. Vermeulen*, How far can we go in applying the principle of mutual recognition?, in: C. Fijnaut & J. Ouwerkerk (Eds.), The future of police and judicial cooperation in the European Union, Leiden: Martinus Nijhoff, 2010, pp. 241-258.

[46] See, inter alia: See, inter alia: Vermeulen & Van Puyenbroeck, ICLQ 2011 (fn. 8); Anderson, 2008 (fn. 8); Alegre & Leaf, ELJ 2004 (fn. 40); Vermeulen & De Bondt, 2011 (fn. 34).

[47] See, inter alia: Möstl, CMLR 2010 (fn.21), pp. 418-423 & 432-436; Nilsson, 2005 (fn. 27); Alegre, 2005 (fn. 40); Suominen, eucrim 2011 (fn. 41).

[48] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007/C 306/01 13 December 2007; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007/C 306/01 13 December 2007.

[49] Consolidated Version of the Treaty on the Functioning of the European Union, OJ C115/47 9 May 2008.

[50] And indication of the *experience* acquired down the road of mutual recognition can be found in point 3.1.1. of the Stockholm Programme, where the European Council states: "In the face of cross-border crime, more efforts should be made to make judicial cooperation more efficient. The instruments adopted need to be more 'user-friendly' and focus on problems that are constantly occurring in cross-border cooperation, such as issues regarding time limits and language conditions or the principle of proportionality. In order to improve cooperation based on mutual recognition, some matters of principle should also be resolved. For example, there may be a need for a horizontal approach regarding certain recurring problems during negotiations on instruments. The approximation, where necessary, of substantive and procedural law should facilitate mutual recognition."

[51] *European Council*, The Stockholm Programme - An open and secure Europe serving and protecting the citizen. OJ C/115 04.05.2010, 2010.

impervious to the past member state hesitance*: "The European Council notes with satisfaction that considerable progress has been achieved in implementing the two programmes on mutual recognition adopted by the Council in 2000 and emphasises that the Member States should take all necessary measures to transpose at national level the rules agreed at European level. In this context the European Council emphasises the need to evaluate the implementation of these measures and to continue the work on mutual recognition."*[52] Based on all of the above, it can be established that mutual recognition since its emergence as a guiding principle in the area of cooperation in criminal matters has been, and remains, high on the EU's agenda.

On the other hand, however, mutual recognition seems increasingly caught up in a bind. Member states continue to show reluctance towards the (timely) implementation of the MR instruments and if this implementation is committed, it is prone to diversity (see infra). Smooth cooperation is hindered by reticence of the member states to issue and execute certain measures and only a limited number of instruments designed seem to attract effective usage. Moreover, the assumed compliance of the member states vis-à-vis fundamental rights and the resulting presupposed mutual trust as the designated premises for successful mutual recognition are increasingly challenged by contradicting ECtHR case law and result in member state hesitance to comply and execute MR instruments.[53] The initial uncritical assumption that the states feel comfortable relying on each other's (judicial) decisions in spite of the existing diversity, and the automatism[54] and forced cooperation inherent to mutual recognition seems collide more and more with the fact that, in reality, the proof of the pudding is in the eating and member states appear less keen to do so.

The acceptance that the levels of trust regarding the protection of procedural rights within the EU needed to be increased was first officially endorsed in 2004, when an ambitious Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the

[52] Point 3.1, The Stockholm Programme.

[53] *M. Meysman*, België en de Basken. De zaak Jauregui Espina als bewijs van het falend wederzijds vertrouwen. De Europese samenwerking in strafzaken onder druk?, Panopticon Tijdschrift voor Strafrecht, Criminologie en Forensisch Welzijnswerk (Pantopticon), 35(5), 2014,pp. 406-426.

[54] See *N. Mole*, The Complex and Evolving Relationship Between the European Union and the European Convention on Human Rights, European Human Rights Law Review (EHRLR),4, 2012, pp. 363-368. In this article, Mole states on pages 363-364 that the cross-border criminal justice as an area of mutual recognition is "predicated on the same fiction: EU law and the Member States implementing it are required to assume that respect for human rights and particularly the procedural safeguards which guarantee its effectiveness are so similar in all Member States that automatic transfers can be made from one jurisdiction to another without prior consideration being given to the reality of the situation in the second state. This is far from the truth.".

EU (the 2004 Proposal) was adopted.[55] After years of (political) disagreement, the 2004 Proposal was eventually abandoned in 2007 for two main reasons. First, member states seemed to be divided on the question of whether the EU was (sufficiently) competent to legislate on purely domestic proceedings or should restrict its legislation to cross-border cases (see the press release on the 2807th Session of the Council on 12th and 13th June 2007, p. 37).[56] Secondly, it was argued that the rights were too vague and that their threshold was too low, or that the proposal would have added little value to the existing protections under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Commission, however, remained convinced of the need for EU action on this subject, and a study carried out for the Commission between 2007 and 2009[57] showed that almost all practitioners involved in cross-border proceedings considered an instrument of this sort to be essential. This was also underpinned by large-scale studies that clearly demonstrated that the member states do not all protect the procedural position of defendants to the same extent.[58] The protection of individuals' procedural rights may therefore be affected by the application of (a) different legal system(s). As a result, the debate was initiated on the introduction of minimum standards that would achieve an acceptable level of procedural protection for all member states so that they could trust one another.[59]

In recent years, the EU has further strengthened its ambition for the introduction of EU-wide minimum procedural rights. Using the new legal basis provided by the Lisbon Treaty,[60] the Council endorsed a Roadmap to strengthen the procedural rights of suspected or accused persons in criminal proceedings (the Procedural Roadmap)[61] as the foundation for future

[55] *European Commission*, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. COM(2004) 328 final, 28.04.2004. Retrieved via: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004PC0328:EN:HTML.

[56] *Council of the European Union*, (12-13 June 2007) 2807th Council meeting - Justice and Home Affairs [Press release]. Retrieved via: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/94682.pdf.

[57] *G. Vernimmen-Van Tiggelen & L. Surano*, The future of mutual recognition in criminal matters in the European Union, Brussels: Institute for European Studies, Université Libre de Bruxelles, 2009.

[58] *T. Spronken & M. Attinger*, Procedural rights in criminal proceedings: existing level of safeguards in the European Union. Brussels: European Commission, 2005; *T. Spronken, G. Vermeulen, D. de Vocht & L. van Puyenbroeck*, EU Procedural Rights in Criminal Proceedings, Antwerpen-Apeldoorn-Portland: Maklu, 2009.

[59] *C. Brants*, Procedural safeguards in the European Union: too little, too late?, in: J. Vervaele (Ed.), European Evidence Warrant. Transnational Inquiries in the EU, Antwerp: Intersentia, 2005, pp. 103-120.

[60] Article 82 of the Treaty on the Functioning of the European Union (TFEU) makes it possible to adopt minimum standards to strengthen the procedural rights of citizens of the EU.

[61] *Council of the European Union*, Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ C 295/1, 04.12.2009. Retrieved via: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF.

action, which was later incorporated into the 2009 Stockholm Programme.[62] The intention of the 2004 Proposal and of the Procedural Roadmap was first and foremost to ensure that existing fundamental norms and standards would be adhered to by all member states.[63]

On a European level, the protection of a defendant's rights in criminal proceedings was/is primarily based on the ECHR, on its Protocols and on the case law promulgated by the European Court of Human Rights (ECtHR). Although the rights conferred by the ECHR are recognised in EU law as a constituent element of the general principles of the Union's law[64] and of the Charter of Fundamental Rights of the EU,[65] it was agreed in the Procedural Roadmap that there is room for further action to ensure the full implementation and respect for these standards, as well as, if appropriate, to expand the existing standards or to make their application more uniform.[66] The results of the studies mentioned above also raise serious doubts as to whether the practice in all member states corresponds with the ECHR standards. Vermeulen and van Puyenbroeck[67] clearly state that: "The ECHR is implemented to very differing standards in the Member States and there are many violations. The number of applications is growing every year and the ECtHR is seriously overloaded. (…) Moreover, Member States have not always amended their legislation to adapt them to the condemnatory judgments of the ECtHR, which, in essence, are not of an enforceable nature. (…) The fundamental question, however, relates to whether the procedural rights provided for by the ECHR are effectively implemented in the EU Member States. At this point, an important distinction should be made between the mere legal recognition of these rights in the criminal justice systems of the Member States and their (effective) implementation in everyday practice."

Minimum standards would hence help to avoid the risk of a member state refusing to cooperate because it has established that another member state does not pay sufficient respect to (fundamental) procedural norms and standards. In addition, clear and uniform minimum

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[62] *European Council*, The Stockholm Programme - An open and secure Europe serving and protecting the citizen. OJ C/115, 04.05.2010. Retrieved via: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF

[63] Procedural Roadmap (fn. 61), Recitals 1 and 2.

[64] The general principles of EU law have been developed by the Court of Justice in order to assist in the interpretation of EU law and in the testing of its validity.

[65] Charter of Fundamental Rights of the European Union. OJ C/364, 18.12.2000. Some of the rights set out in the Charter correspond directly to those in the ECHR. Articles 4 and 47 of the Charter cover the prohibition of torture and inhuman or degrading treatment or punishment, and the right to an effective remedy and to a fair trial. These correspond to Articles 3 and 6 of the ECHR.

[66] Procedural Roadmap (fn. 61), Recital 2.

[67] Vermeulen & van Puyenbroeck, ICLQ 2011 (fn.8).

procedural standards implemented in all member states[68] would make it easier for defendants to claim that their procedural rights will be or have been affected, since it may prove difficult in practice for an individual to establish a breach of the ECHR. In the context of the EAW, for example, it is only a risk of a flagrant denial of justice after surrendering to the other member state, which is particularly difficult to prove with respect to cross-border criminal proceedings since it involves arguing about something that might happen in the future in another country, that can constitute a basis for an individual's claim.[69]

Although the introduction of common minimum procedural standards definitely enhances the protection of procedural rights throughout Europe, only the Roadmap's Measure E[70] directly touches upon the specific procedural problems for those with particular mental conditions. Neither Measure A on the right to translation and interpretation nor Measure B on the right to information provides specific safeguards for people suffering from a mental disorder. Measures C and D on the right to legal advice and the right to inform relatives could have more impact on the situation of those with a mental disorder, since legal representatives and relatives may point out that the suspect is mentally ill, which may have major repercussions on the nature of the interrogation procedures and on the perceived significance and veracity of the person's statements.

Concurrent with the abovementioned evolutions in the field of the EU's criminal policy, there has been a steady increase of studies in the recent years focusing on mentally disordered individuals caught up in criminal proceedings (see infra). These studies have shown various difficulties with timely screening and detection of mental vulnerability, that legal systems

[68] It may be argued that a strict reading of Article 82 of the TFEU implies that the EU does not have the competency to introduce minimum standards in a purely domestic context, but only has the ability to adopt minimum standards in cross-border criminal proceedings and to the extent necessary to facilitate mutual recognition. Until now, however, the minimum standards that have already been adopted have been applied in merely domestic contexts, and it may be expected that this will be the case for all minimum standards envisaged by the Procedural Roadmap.

[69] Soering v. The United Kingdom, 7 July 1989 (14038/88); Shamayev and others v. Georgia and Russia, 14 April 2005 (36378/02) and Mamatkulov and Askarov v. Turkey, 4 February 2005 (46827/99). See also: *House of Lords*, The European Union's Policy on Criminal Procedure. 30th Report of Session 2010-21 (pp. 25-26). European Union Committee (Ed.). London, 2012. Retrieved via: http://www.statewatch.org/news/2012/apr/eu-uk-hol-select-criminal-procedure.pdf

[70] This Measure E, which aims to pay special attention to suspected or accused persons who, due to their age or mental or physical condition, cannot understand or follow the content or the meaning of the proceedings, resulted, on the 27th of November 2013 in the first genuine initiative vis-à-vis mentally vulnerable defendants. See: *European Commission*, The Right to… - a Fair Trial! Commission wants more safeguards for citizens in criminal proceedings. IP/13/1157 27/11/2013 [Press release]. Retrieved from http://europa.eu/rapid/press-release_IP-13-1157_en.htm; *European Commission*, Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. OJ C 378/8, 24.12.2013.
Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF. The analysis of these (and other) documents was conducted for the first article of this dissertation and can be found infra.

across Europe often fail to meet the criteria necessary to assure adequate screening and detection, enable effective participation and deal with the issue of establishing criminal responsibility in an acceptable fashion. Moreover, mental healthcare provisions and adjusted accommodation for mentally disordered offenders is prone to EU-wide diversity and – more alarming – of often substandard quality. Apart from the increase of such studies, the field of forensic sciences evolved through the years and various recent studies shed new light on the position of mentally disordered individuals in criminal proceedings, as well as the relationship between authorities and these individuals.[71]

Acknowledging all of the above, this research wishes to incorporate all of these recent evolutions and utilise them to assess the current and future state of cooperation in criminal matters within the European Area of Freedom, Security and Justice, and specifically establish the position of mentally disordered suspects and offenders herein.

III. Methodological approach

1. Research methods

The study conducted is that of standard legal doctrine, in that it incorporates the classical features of legal science and its particularities. As Van Hoecke[72] rightfully states, one of these particularities is often the complete lack of any identifiable methodology. Yet, certain particular aspects can be identified:

- This study[73] was conducted through desktop research. The main research activity during this study was the study, analysis and interpretation of texts and documents. Legislative and policy documents on International, European, EU and National level were the main research objects.

[71] See, for a recent anthology of new insights: *J. Shaw, S. Porter & L. ten Brinke*, Catching Liars: training mental health and legal professionals to detect high-stakes lies, The Journal of Forensic Psychiatry & Psychology, 2013, pp. 145-159*; J. Shaw & M. Woodworth*, Are the misinformed more punitive? Beliefs and misconception in forensic psychology, Psychology, Crime and Law, 2013, pp. 687-706; *C. Chaplin & J. Shaw*, Confidently wrong: police endorsement of psycho-legal misconceptions, Journal of Police and Criminal Psychology, 2015, pp. 1-9; *J. Shaw & S. Porter*, Constructing rich false memories of committing crime, Psychological Science, 2015, pp. 291-301; *B. Snook, D. Brooks & R. Bull*, A lesson on interrogation from detainees. Predicting self-reported confessions and cooperation, Criminal Justice and Behavior, 2015, pp. 1243-1260.

[72] *M. Van Hoecke*, Legal Doctrine: Which Method(s) for What Kind of Discipline? In M. Van Hoecke (ed.). Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline, Oxford: Hart Publishing, 2013, pp. 1-18.

[73] In the words of Van Hoecke, 2013 (fn. 72) a hermeneutic discipline.

- The analysis of the aforementioned documents was supplemented with a study of legal doctrine.
- Apart from the classical legal doctrine, the study was expanded to incorporate a.o. medico-legal research & (forensic) psychiatric literature
- The *empirical verification*[74] took place by checking statements from the legislative instruments, policy instruments and legal doctrine against judicial practice. In order to do this, the main focus was placed on the case-law of the European Court of Human Rights and the Court of Justice and European Union. As such, certain statements like the mutual trust tenet of the member states' shared commitment and respect for human rights was checked against the case-law of the ECtHR.
- Ultimately, the research incorporates an argumentative and normative method in that it interprets the results and findings of the study, decides on the argumentation which supports a selected interpretation[75] of the texts and documents and aims to formulate recommendations looking for 'better law'.[76]

2. Research format

The format choice of the research was to create an output in the form of Articles. As such, the research aims to be both topical and sententious in its output. This required a clear delineation of a specific study scope and topic for each article (also incorporating Journal standards and preferences), but also a broader delimitation of the research in general, without making concessions in terms of preciseness or completion.

3. Delimitation of the research scope

The *summa* delimitation of this research is that it examines the position of mentally disordered suspects and offenders within the specific context of European cooperation and mutual recognition instruments. Hence, the position of a vulnerable defendant within a cross-border context is analysed against the backdrop of the existing EU instrumentarium to deal

[74] Van Hoecke, 2013 (fn. 72), p. 21 et seq.
[75] *J. Smits*, redefining normative legal science: towards an argumentative Discipline, in: F. Grünfeld et al and F. Coomans (eds), Methods of Human Rights Research, Antwerp: Intersentia, 2009.
[76] *J. Wendt*, De methode der rechtswetenschap vanuit kritisch-rationeel perspectief, Zutphen: Paris, 2008, p. 141.

with criminal proceedings in a member state other than that of their nationality or habitual residence as well as criminal proceedings that involve investigative, prosecutorial, as well as sentence enforcement acts in a multi-member state context.

As such, the main research question was as follows:

> Do mentally disordered suspects and offenders occupy a special position within European cross-border criminal proceedings and are they in need of a such a prerogative in the AFSJ's mutual recognition framework?

The aim of the research is therefore to take the measure of the feasibility and desirability of the principle of mutual recognition in criminal matters by focusing on a particular population of suspects and offenders. Simultaneously, the research wishes to pinpoint the potential flaws and even hazards of an unbridled application of the mutual recognition principle by establishing the consequences for mentally disordered individuals caught up in its procedures.

After this leading delimitation, the entirety of the MR framework was scrutinized in order to establish the relevant instruments for the research to be conducted on.

Ranging from the pre-trial, investigative stage to the trial phase and ultimately the (transfer of) sentence execution, the following instruments are delineated as holding relevant provisions and/or consequences for the position of a vulnerable defendant in a cross-border context. However, due to the inherent nature and function of these instruments, the delineation between the different phases of a criminal procedure – pre-trial, trial and post-trial – and their allocation hereto is but a guideline, as overlaps and spill overs may occur.[77]

A. Pre-trial/trial phase

Succinctly stated, four instruments seemed of particular relevance in the pre-trial phase. Two of these instruments may be considered under the moniker of 'detaining and transferring an individual' while the other two are instruments aiming to facilitate the 'request and transfer of

[77] For instance, The European Arrest Warrant has a primordial role to play in pre-trial detention, but may also be issued in a post-trial context when a member state has reached a judgment and issued a sentence, but the offender has fled, prompting the member state to issue a warrant for his arrest. Likewise, The (former) European Evidence Warrant and the new Dir. EIO play an important role in the investigative stage, but the admissibility of the evidence gathered will be decided during the trial stage.

evidence'. This is, however, not a clear-cut delineation as will be explored infra, but helps to situate the instruments in the criminal procedure and pinpoint their primordial role and purpose.

The Framework Decision on the European Arrest Warrant (FD EAW)[78] enabling the issuing of a warrant by a member state with a view to the arrest and surrender by another member state of a requested person for the purposes of conducting a criminal prosecution is perhaps the most well-known and most successful – in terms of usage –instrument that emanated in the area of cooperation in criminal matters. The EAW simplifies and improves judicial procedures with the aim to facilitate fast arrest and surrender procedures for persons against whom (a) member state(s) seek(s) to conduct a criminal prosecution but who is currently (presumed to be) outside of the territory of that state. In other words, the EAW specifically targets the recognition of arrest warrants through an EU-standardised form, the (provisional) detention of the sought person and the fast surrender of the latter. In addition, 2009 brought the Council Framework Decision on the recognition of supervision measures (FD Supervision).[79] The instrument specifically targets the recognition of a decision on supervision measures issued in another member state as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures. As such, FD Supervision can be considered as an alternative to the European Arrest Warrant as it promotes an alternative to the provisional detention inherent to the EAW-procedures by creating a framework to issue, recognise, enforce and monitor certain obligations and instructions imposed on a natural person in accordance with the national law and procedures of the issuing State. Both instruments therefore deal with the detention and/or alternatives hereto of the individual in cross-border criminal proceedings.

While the European Arrest Warrant has become a wildly popular – if not overused[80] - tool in the hands of the European member states, the FD Supervision is quite the opposite: After

[78] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 (18.07.2002).
[79] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20 (11.11.2009).
[80] *M.T. Schunke*, Who's responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions in the EU, Intersentia: Cambridge – Antwerp – Portland, 2013.

suffering an extended period of time in which hardly any implementation took place[81], the instrument is currently standing at 22 out of 28 implementations[82] but, more importantly, seven years after its realisation, only one (1) case is currently pending in the entire EU.[83] As such, the instrument currently has no practical application, lacks profound attention of the legal doctrine and is devoid of any relevant case law. For these reasons, and based on the consideration of keeping the research concise and to the point, the instrument was omitted from an in-depth investigation.

Likewise, the Framework Decision on the Evidence Warrant (FD EEW)[84], enabling the competent judicial authority of a member state to obtain objects, documents and data from another Member State, aimed at replacing (certain aspects of) the system of mutual assistance in criminal matters between member states for obtaining objects, documents and data for use in criminal proceedings, was left out. The instrument did not permit the recognition and enforcement of a request to obtain certain information through an active investigative technique but foresees a standardised procedure, limited refusal grounds and quick transfer of requested evidence already available in the executing member state. Apart from the fact that state implementation rates – currently, eight years after its arduous conception[85], not even half (13) of the member states have implemented the instrument – and effective procedures stayed well below par during the EEW's existence, the instrument will be replaced entirely by the European Investigation Order (EIO)[86] which was presented in 2014 and is due to be transposed into the member states national laws by 2017.

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[81] FD Supervision was due to be implemented by the deadline of 1 December 2012, but by mid-2013 only five member states had implemented the instrument. See, f.i., the Commission Update presentation given by Ms. Jesca Beneder of the DG Justice at the Academy of European Law's seminar on detention in June 2013, available via this link: https://www.era-comm.eu/detention/pdf/Beneder.pdf.

[82] Last consulted on the European Judicial Network (EJN) Judicial Library on the 14th of March 2016 after the Last review by the EJN Secretariat on the 11th of March 2016.
Retrieved via: http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39.

[83] See *M. Meysman*'s presentation on the 26th of February at the Academy of European Law's seminar in Strasbourg on Improving conditions related to detention. The Role of the ECHR, the Strasbourg Court and National Courts, 2016 and the affirmation hereof by *Prof. I. Durnescu* who presented a theoretical application of the FD Supervision. Available via this link: https://www.era.int/upload/dokumente/18079.pdf.

[84] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 (30.12.2008).

[85] With a political agreement on the instrument finally reached on the 1st of June 2006 during the Council in Luxembourg and a follow-up Calvary of two years before completion. See, i.a.: *G. Vermeulen, W. De Bondt & Y. Van Damme*, EU cross-border gathering and use of evidence in criminal matters : towards mutual recognition of investigative measures and free movement of evidence?, IRCP Series (vol. 37), Antwerpen: Maklu, 2010; *A. Mangiaracina*, A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order, Utrecht Law Review (ULR), 10(01), 2014, pp. 113-133.

[86] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1 (01.05.2015).

Given that an EIO can be issued for the purpose of having one or several specific investigative measure(s) carried out in the executing state with a view to gathering evidence as well as the obtaining of evidence that is already in the possession of the executing authority, the Investigation Order is a more elaborate instrument that comprises much if not all of the EEW's scope and was therefore selected for research purposes.

B. Post-trial phase

In the post-trial phase, two instruments are of main importance: The Framework Decision to apply the principle of mutual recognition on custodial sentences or measures involving the deprivation of liberty (FD Custodial)[87] to enable the transfer of the enforcement of a sentence to the member state of nationality and/or habitual residence with a view of enhancing the social rehabilitation of the sentenced person, and the Framework Decision to apply mutual recognition to the supervision of probation measures and alternative sanctions (FD Alternative).[88]

Similar to the distinction between the EAW and FD Supervision, FD Custodial seeks to facilitate recognition, transfer and enforcement of sentences imposing detention (or measures involving the deprivation of liberty) whereas the FD Alternative aims to provide alternate options for the member states.

Apart from these instruments, it is important to indicate the potential post-trial role of FD EAW as a Warrant may be issued for the execution of a custodial sentence or detention order. Herewith, the FD EAW allows for the arrest and surrender of a sentenced person who has fled the issuing state to escape the execution of a custodial sentence or detention order, but does not collide with the aforementioned instruments as it does not foresee the execution and enforcement of the sentence by the addressed executing state. It should therefore be regarded as a means for the quick return of a sentenced fugitive by recognising the warrant for his or her

[87] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327 (05.12.2008).
[88] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions or executing a custodial sentence or detention order, OJ L 337/102 (16.12.2008).

arrest, not the recognition of a judicial decision imposing a custodial sentence (or alternative) followed by its enforcement in the executing state.

For the scope and conciseness of the research, but also because the FD Alternative's practical deployment remains below par[89], the instrument was omitted from in-depth research. Moreover, While it may be perceived – particularly so in the field of measures depriving mentally disordered offenders of their liberty – that an overlap is possible between FD 909 when it applies to a measure involving the deprivation of liberty and FD 947 when applying to alternative sanctions, the latter instrument's Articles 1.3(a) and 2.4 make clear that it is not applicable for the execution of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty which fall within the scope of Framework Decision 909. Furthermore, the definition of an alternative sanction is limited to a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or instruction.

C. Crossover Instruments

Apart from the above mentioned instruments particularly *reserved* for either a pre- or post-trial stage, two more notions need to be examined in order to fully explore the position of mentally disordered defendants. The Framework Decision on taking account of prior convictions (FD Prior Convictions)[90] and the Framework Decisions establishing the European Criminal Records Information System (ECRIS)[91] were designed with the purpose of determining the conditions under which, in the course of criminal proceedings in a member state against a person, previous convictions handed down against this person for different facts in other member states, are taken into account and to create an efficient exchange of information on criminal convictions and criminal records between member states.

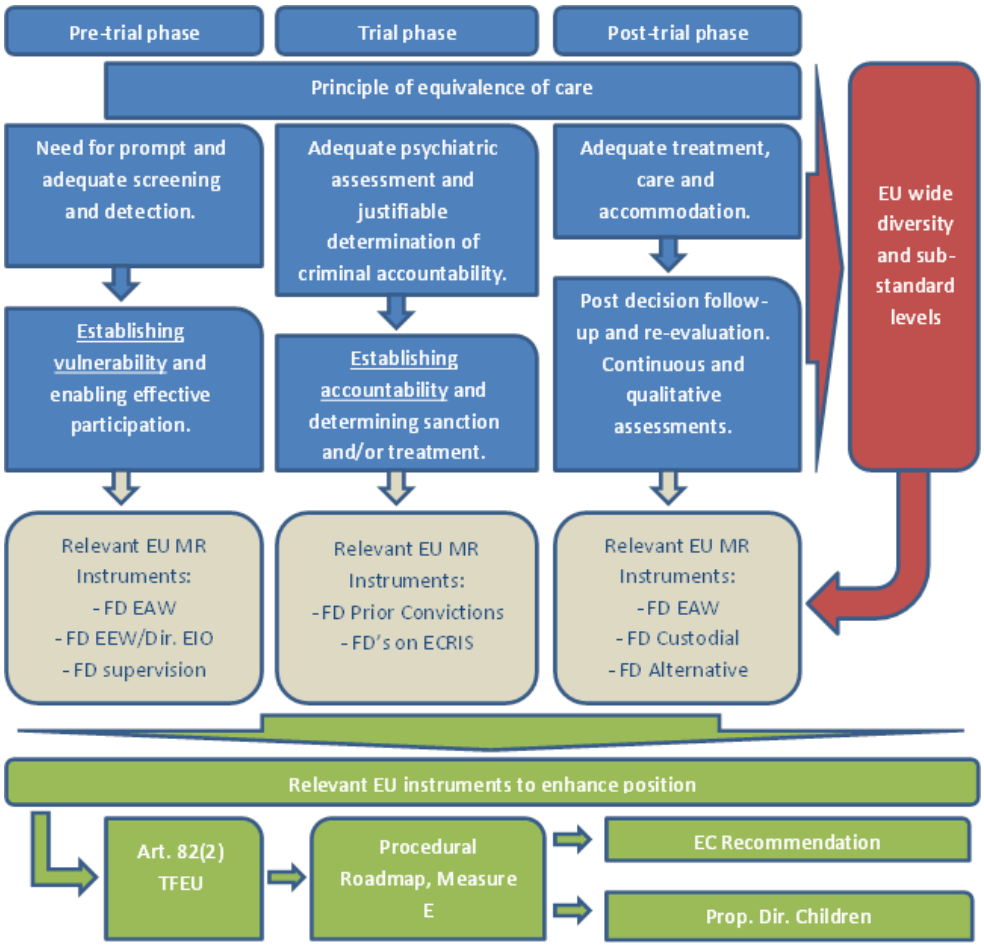
[89] See the work on the promotion of probation and the Framework Decision via the Confederation of European Probation, lamenting the low implementation and deployment rates of both FD Alternative and FD Supervision. Via: http://cep-probation.org/knowledgebase/.

[90] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220/32 (15.08.2008).

[91] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93/23 (07.04.2009) & Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93/33 (07.04.2009).

Not mutual recognition instruments *per se* (as they do not imply the actual recognition and execution of a judicial decision) they aim to couple a trans-boundary element to a criminal conviction or criminal record by making this information available to the member states and setting out the conditions for taking this information into account during criminal proceedings. As such, they may be applicable in both a pre-trial, trial and post-trial stage.

The following is a visual representation of the exposition above:



4. Research Lines

Following this first delineation and selection of (MR) instruments, the research was further developed into four research lines:

> Research line 1: Establishing the EU's approach towards mentally disordered suspects and offenders.

Before the research could delve into the specific position of mentally disordered suspects and offenders in MR instruments and establish the consequences hereof, it was necessary to establish whether there is a margin for EU attention on this subject to begin with. As such, the first research line was created to establish that there is indeed preparedness and a competency margin on an EU level to approach the position of mentally disordered suspects and offenders within the AFSJ's mutual recognition in criminal proceedings within a cross-border context.

To do so, the first research line conducted a cross-analysis of the recent EU developments on an EU level with a view of enhancing the position of 'vulnerable' defendants. Both the Commission Recommendation and the Proposal for the Children's Directive were analysed, and a critical assessment of the competency for, and feasibility and necessity of, an EU intervention in this area was conducted. The method was through policy and legislative texts analysis in combination with a legal doctrine review. This first research line resulted in the publication of an article in the European Criminal law Review Journal (EuCLR).

The subsequent research lines then dealt with the exploration of the position of mentally disordered suspects and offenders.

> Research line 2: Guaranteeing and safeguarding the rights of mentally disordered suspects in criminal proceedings by effectuating adequate screening and detection at the earliest stage possible.

A. Effective participation.

The premise is that guaranteeing and safeguarding the rights of mentally disordered suspects and offenders in criminal proceedings is only possible when there is adequate screening and detection at the earliest possible stage to establish vulnerability in an appropriate way and act accordingly in all the subsequent procedures and approaches. There exists a general consensus

on the importance of screening procedures as well as, at the same time, on the diversity and substandard quality of these mechanisms across the EU. This is a continuation of the first research line, in that the ensuing publication already elaborated on the under-identification of mentally ill suspects in criminal proceedings and lamented on the lack of an overarching definition of a vulnerable defendant.

The second research line further explores these findings by focusing on the right to effective participation through multiple departure points:

- Firstly, the diversity and substandard quality of screening and detection mechanisms are established through literature review, member state analysis and case-law.
- Secondly, the role of effective participation as a fundamental principle of (criminal) law is analysed through literature review and case-law (especially the ECtHR interpretation) and held against the backdrop of specific member states' legal regimes and de facto practices.
- Thirdly, the outcome hereof is matched against the provisions in the selected mutual recognition instruments. In consideration of a solution for this diversity and below-par results, the possibility and feasibility of the EU to establish minimum procedural standards based on art. 82, 2 TFEU is explored.
- Starting from the Council's Procedural Roadmap and its subsequent Directives , specific reference is made to measure E of the Roadmap with its view to provide special safeguards for suspected or accused persons who are vulnerable.
- Lastly the Commission Recommendation , as the hitherto sole tentative outcome of measure E to specifically (but not only) address vulnerable defendants with a mental disorder, is assessed.

B. Identification of mental vulnerability and the gathering and admissibility of evidence.

Only when an individual's vulnerability due to a mental disorder is timely established, the potential hazards for both the person involved in terms of treatment and approach as well as in terms of his effective participation can be evaded. Moreover, vulnerability greatly influences the ongoing criminal proceedings in terms of legality. Therefore, only a prompt establishment

of vulnerability diminishes – and ideally evades – potentially hazardous judgments and decisions in turn potentially resulting in illegitimate evidence or even trials.

As such, the second part of this research line focused on the gathering and admissibility of evidence against the backdrop of the established under-identification and often problematic effective participation, and specifically departed from the following research question:

- Does the Directive on the European Investigation Order provide adequate provisions and safeguards regarding the recognition and admissibility of evidence – both already obtained or gathered through a demanded investigative technique – in connection to a mentally vulnerable defendant?

In order to do so, desktop research was conducted which consisted in the cross-analysis of strictly legal research and medico-legal research: The assessment of the European Investigation Order via legislative texts (and an historical analysis of MLA instruments) and legal doctrine and the analysis of various studies with a forensic-psychiatric connotation to identify pressing issues concerning mentally disordered suspects within the investigative sphere. The concrete focus was on the hearing and interrogation (and the potentially necessary cross-border transfers required for this) of mentally disordered suspects and the qualitative and quantitative aspects of forensic psychiatric expertise.

This research resulted in an Article which was submitted (awaiting peer review) to the Psychology, Crime & Law Journal.

Research line 3: Attribution of criminal accountability

Following the establishment of a mentally disordered suspects vulnerability due to a mental disorder, and after the investigative phase in which the relevant evidence is gathered, the research focuses on the European diversity in terms of attributing criminal accountability to mentally ill offenders. As such, the research focuses on individuals against whom the actus reus of a criminal offence is deemed proven, but who cannot or may not be considered (fully) criminally liable due to their mental disorder. While this fundamental question on a person's criminal accountability is ultimately settled at the trial phase by a judicial authority, the foregoing proceedings – investigative measures, hearings, prior convictions, history in

healthcare - have the potential to greatly influence this assessment. In addition, the outcome of the establishment of criminal accountability affects the (future) approach towards the individual in terms of treatment and care. Within this context, it is primordially important to acknowledge the diversity in the legal systems of the EU member states regarding their National criminal accountability acquis and to link this to the corresponding provisions in the mutual recognition instruments aimed at colligating an EU-wide recognition to these National judicial decisions.

The research question revolved around the hypothesis that the existing diversity concerning accountability doctrines across Europe in itself is not pernicious per se but the result of historical/cultural and other (legal) traditions. However, and linking back to the qualitative and quantitative aspects of the forensic experts under research line 2, the diversity regarding (the quality) of psychiatric assessments in the MS does seem inexcusable considering the supposed high quality label of EU MS as the cornerstone of mutual trust based recognition.

The research departed from a *summa divisio* regarding (criminal) accountability doctrines, discerned between MS with a continental/civil law tradition and those with a Anglo-Saxon/common law tradition: Where the former correlate (their) criminal accountability (doctrine) with the measures/sanctions appropriate for the mentally disordered individual involved in criminal proceedings, the latter reject this accountability as a useful benchmark as these MS disconnect the accountability of the individual for the offence (allegedly) committed from the measure/sanction deemed appropriate. Between the 'continental' MS, a distinction can be made between the MS applying a dichotomous system and the MS applying a system of graded criminal accountability. In order to investigate the consequences of this divers approach, an analysis of three member states was conducted: Belgium, the Netherlands and England & Wales. Following the research on these legal systems' doctrines vis-à-vis the attribution of criminal accountability, the results were then matched with the application of the European Criminal Records System (ECRIS) and the Framework Decision on the recognition of foreign judgments. Ultimately, and relevant for the envisioned cooperation vis-à-vis transfers of custodial sentences and measures involving in the deprivation of liberty, the influence of the diverse accountability doctrines on the sentencing and subsequent sanctions and/or measures was explored.

As aforementioned, these instruments were designated as crossover elements in the research, and will be incorporated in this dissertation at the appropriate position.

> Research line 4: Care and treatment of mentally disordered suspects and offenders: Guaranteeing the equivalence of care for individuals involved in criminal proceedings assessed as vulnerable.

Once a suspects has been determined has being mentally vulnerable, the obligation is on the member states to provide adequate measures in terms of treatment and care for the defendant during the criminal proceedings and his or her (potential) deprivation of liberty. Encased in the so-called *equivalence of care* or *normalisation* principle, it implies that (health)care and treatment provided to the defendant during his or her deprivation of liberty needs to be equivalent to the healthcare and treatment that is available in the civil society. As such, this principle stretches across the lines of healthcare, legal affairs and human rights, as well as the pre-trial (ex. for remand custody and/or provisional detention) and post-trial stage.

The final research line focuses on this principle within the context of the Framework Decision on the transfer of custodial sentences and measures involving the deprivation of liberty (FD 909). Departing from a case-law analysis of the ECtHR, it makes the analogy to the ECtHR and CJEU judgments in the European asylum policy. Based on the results and interpretation of this analogy, the FD 909 and its social rehabilitation purpose are scrutinised.

The main research question under this research line is as follows:

- Could and/or should the mounting ECtHR evidence of fundamental rights breaches by the member states in terms of detention conditions pose a fundamental problem for cooperation in criminal matters?

This question and its findings were hen further explored:

- What are the consequences for the application of the FD 909?
- How do we need to interpret the EU's stance on the difficult relationship between mutual recognition and fundamental rights concerns, with specific reference to the CJEU's policy?

This research resulted in the publication of an Article in the International Journal of Law and Psychiatry.

Structure of the Phd Study:

Chapter 1. The position of vulnerable defendants in the EU's criminal policy

The first research line was created to establish that there is indeed preparedness and a competency margin on an EU level to approach the position of mentally disordered suspects and offenders within the AFSJ's mutual recognition in criminal proceedings within a cross-border context. Before the assessment of the selected mutual recognition instruments (see supra) could take place and before the procedural Roadmap's harmonisation pathway could be incorporated, it was deemed necessary to investigate whether the mentally disordered had any position in the EU MR and Procedural framework to begin with. To do so, a first article was dedicated to the double-analysis of the outcome of the Roadmap's Measure E following the European Commission's press release on the 27th of November 2013: Both the Proposal for the Children's Directive[92] (which was adopted – with amendments - by the European Parliament only very recently on the 9th of March 2016[93]) and the Commission Recommendation[94] were analysed from a competency perspective and in terms of expediency. The article also dedicated attention to the under-detection and identification of mentally disordered defendants in criminal proceedings, and urged the need for an integrated approach on an EU level.

This Article was published as: *M. Meysman*, Quo vadis with vulnerable defendants in the EU? European Criminal Law Review (EuCLR), 2(4), 2014, pp. 179-194. A2 classification Journal.

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[92] *European Commission*, Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, 2013. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0822:FIN:EN:PDF.

[93] *European Parliament*, legislative resolution of 9 March 2016 on the proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, 2016. See the procedural file of the proposal via this link: http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52013PC0822.

[94] *European Commission,* Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused of criminal proceedings, OJ 2013 C 378/8.
Retrieved via http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF.

Quo vadis with vulnerable defendants in the EU?

A closer look at the recent initiatives for procedural safeguards for vulnerable suspects and offenders. The equivocality of the Union's approach effectuating Measure E and the need for an adequate policy towards mentally impaired defendants.

Abstract: In a recent press release of the 27th of November 2013, the European Commission presented a package of five proposals to further strengthen procedural safeguards for citizens in criminal proceedings. Two of these proposals directly stem from the Council Procedural Roadmap's Measure E on the (need for) special safeguards for suspected or accused persons who are vulnerable. Whereas the roadmap envisions improved attention for a vulnerable subject regardless of the origins of this vulnerability – be it due to age, mental or physical condition – the recent proposals indicate a clear differentiation between vulnerability based on the defendant's age on the one hand, and the (adult) defendant's mental or physical capacities on the other hand. As such, a proposal for a Directive for procedural safeguards for children was presented, whereas adult defendants in criminal proceedings had to be satisfied with a non-binding Recommendation. While it may indeed be defended that an accumulation of these sources for diminished capacity is not preferable, the Commission's approach and underlining rationale seem equivocal. This article observes these recent initiatives from a dual viewpoint. First of all, they are looked at against the backdrop of the ongoing debate vis-à-vis mutual recognition and the introduction of auxiliary procedural safeguards. The article, therefore, critically assesses the supposed link between the introduction of minimum procedural standards for a category of defendants which, precisely due to their vulnerability, seems less capable of being involved in criminal proceedings with a cross-border dimension. With the latter still the raison d'être for the mutual recognition principle and the basis for the EU to establish minimum rules, the article argues that the EU drifts further away from its Treaty based competence. Secondly, the Commission's reasoning and subsequent policy choice to divide vulnerability based on the defendant's age is analysed with respect to the indications coming from European policy makers and scholars alike. Without aiming to promote a viewpoint of vulnerability where one cause is hierarchically decisive over the other, the article makes a case for an (equally) adequate instrument for defendants with a mental disorder in criminal proceedings.

Keywords: mutual recognition - procedural minimum rights - vulnerable defendants - age - mental condition - measure E

I. Introduction

Following the inception of the new era[95]of EU policy making in the field of criminal law since the Tampere milestones[96] and the implementation of the principle of mutual recognition for judicial decisions throughout the EU, many a critical observer has lamented over the EU's criminal justice policy's emphasis on the simplification and acceleration of police and judicial cooperation without consideration for setting an acceptable standard for fundamental rights.[97]However, from the early conception of mutual recognition on both the Tampere conclusions[98]and the Programme of Measures to implement the principle of mutual recognition[99], it has been indicated that protecting defence rights by procedural safeguards operating to equivalent standards in all member states was seen from the outset as an integral part of the mutual recognition scheme.[100] Notwithstanding this observation, the majority of the mutual recognition instruments that have emerged over the past decade has shown little consideration for the fundamental defence rights of the person involved.[101]With this initial critical response on the instruments[102]emerging under the mutual recognition umbrella and

[95] The Tampere Council has clearly indicated mutual recognition as 'the future cornerstone' for judicial cooperation in the EU. Furthermore, various scholars endorse that the introduction and effectuation of the principle has indeed heralded a fundamentally different approach towards EU policy making in the field of criminal law. See, inter alia: Bantekas, ELR 2007 (fn. 10); *V. Mitsilegas,* The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice? European Law Review (ELR), *34*(4), 2009, pp. 523-560; Vermeulen, 2008 (fn. 8).

[96]*European Council*, Tampere European Council Presidency Conclusions, 1999. Retrieved from: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

[97]See, inter alia: Ambos, 2008 (fn. 8); Anderson, 2008 (fn. 8); Cape, Hodgson, Prakken & Spronken, 2007 (fn.8); Vermeulen, 2008 (fn. 8); Vermeulen & van Puyenbroeck,ICLQ 2011 (fn. 8).

[98] Tampere Conclusion 30 (fn. 3) invited the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases. Conclusion 31 refers to multilingual forms or documents to be used in cross-border court cases. Conclusions 33 and 35 respectively mention facilitation of the judicial protection of individual rights and that the principle of fair trial should not be prejudiced by fast track extradition procedures. Conclusion 40 points out that it seeks to develop measures against crime while protecting freedoms and legal rights of individuals.

[99]*Council of the European Union,* Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ 2001 L C12/10. The Programme indicates a number of parameters – determining the effectiveness of mutual recognition – amongst which parameter 3 includes mechanisms for safeguarding the rights of (third parties, victims and) suspects and parameter 4 mentions the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition.

[100]*C. Morgan*, Le Rapprochement des procédures pénales - Procedural Safeguards. Revue internationale de droit penal (RIDP), 77(2006 1/2), 2007, pp. 307-312.

[101] Already in 2000, Peers criticised that 'the negative legal integration in the [former] third pillar has been unaccompanied by any measure to ensure minimum standards for defence rights. See: Peers, 2000 (fn. 8), p. 187.

[102]Most notably the 'flagship' Framework Decision on the European Arrest Warrant.

their lack of attention to fundamental procedural rights, the EU undertook a number of initiatives.

Already in December 2000, the European Commission (the Commission), the Council and the Parliament signed the EU Charter of Fundamental Rights[103] (Charter, or CFREU) as an important (symbolic) step indicating the EU's consistent commitment to fundamental rights and justice. In 2004, and following an initial Green Paper[104], the Commission tried to give this commitment a more practical rendering in the field of criminal law by submitting the Proposal for a Council Framework Decision (CFD) on certain procedural rights in criminal proceedings throughout the European Union.[105]Ambitious as the Proposal was, it was ultimately abandoned in 2007 after years of political disagreement.[106] With the coming into force of the Lisbon Reform Treaty in 2009[107] – which also means the Fundamental Rights Charter's provisions now have a binding legal force[108] – the EU has taken up its ambition to strive for minimum procedural rights with renewed courage. At a time of declining trust in mutual recognition[109], the Council, making use of the new legal basis provided by the Lisbon Treaty[110], came up with a Resolution endorsing a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[111] Based on a step-by-step approach, the Council endorses specific procedural rights in so-called *measures*. So far, this has resulted in six measures[112] of which the first four

[103]Charter of Fundamental Rights of the European Union. OJ 2000 L C/364.

[104]*European Commission,* Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. Brussels: COM(2003) 75 final, 2003.
Retrieved from http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf.

[105]*European Commission,* Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. COM 328 final, 2004.
Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004PC0328:EN:HTML.

[106]Vermeulen & van Puyenbroeck, ICLQ 2011 (fn.8), p. 1017; *C. Morgan*,(2012). Where Are We Now With EU Procedural Rights?, European Human Rights Law Review (EHRLR) (4), 2012, p. 427-432.

[107]Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007 C 306/01.

[108] The Lisbon Treaty amended article six of the Treaty on the European Union (TEU), provided that the Charter is now legally binding, having the same status as the primary EU law, and that the EU 'will accede' to the European Convention on Human Rights (ECHR). See: *S. Douglas-Scott*, The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review (HRLR) (11), 2011, pp. 645-682.

[109]Vermeulen & De Bondt, 2011 (fn. 34), p. 18.

[110] Since Lisbon, the Treaty on the Functioning of the European Union (TFEU) allows – in Article 82, 2. – for the establishment of minimum rules under certain conditions. See infra.

[111]*Council of the European Union,* Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009.
Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:EN:PDF.

[112] Measures A to F: Measure A on (the right to) translation and interpretation, measure B on (the right to) information on rights and information about the charges, measure C on (the right to) legal advice and legal aid, measure D on (the right to) communication with relatives, employers and consular authorities, measure E on (the necessity of) special safeguards for suspected or accused persons who are vulnerable and measure F on a green paper on (specific safeguards for/during) pre-trial detention. Own addition in brackets.

have resulted in three Directives[113] adopted by the Council and the Parliament. The fifth one, measure E on the (need for) special safeguards for suspected or accused persons that are vulnerable, has only very recently seen the creation of two separate instruments. With a press release on the 27th of November 2013[114], the Commission presented – as a part of a five-part proposal package – a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings[115]and a (Commission) Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.[116]Hence, unlike the previous measures A to D, encapsulated in the three Directives, measure E has developed into two separate instruments, and appears to have been split along the faultline of its definition of vulnerability. While the Commission envisions a firm Directive on special safeguards for children suspected or accused of crime, thus specifically envisioning safeguards for vulnerable persons due to their age, disordered adult defendants will, at least for now, have to make do with the general Recommendation.

II. A critical note on harmonising criminal procedures for vulnerable defendants: is the EU moving further away from a cross-border dimension?

Before delving into the Commission's reasoning for this two-way approach, the general concept of introducing minimum standards for a specific category of defendants is to be assessed in terms of competency and feasibility. As indicated below, the previous measures and their subsequent Directives sparked a debate on the EU's power to do so. Yet, where these measures have each targeted a specific type of procedural right – information, translation, access to legal advice, etc. – applicable to a general public of people involved in criminal proceedings, the initiatives flowing from the Roadmap's measure E aim to enable a set of rights to a specified category of individuals based on their vulnerability. In order to legitimately do so, the Union

[113]Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L/280; Directive 2012/12/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L/142; Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. OJ 2013 L 294.

[114]*European Commission,* The Right to… - a Fair Trial! Commission wants more safeguards for citizens in criminal proceedings. IP/13/1157 27/11/2013 [Press release], 2013. Retrieved from http://europa.eu/rapid/press-release_IP-13-1157_en.htm.

[115]*European Commission*, Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, 2013.
Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0822:FIN:EN:PDF.

[116]*European Commission,* Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused of criminal proceedings, OJ 2013 C 378/8.
Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF.

should be clear in identifying how these initiatives would fall within the scope of competence bestowed upon it by its Treaties.

1. The Procedural Roadmap and competence issues

With the Lisbon Reform Treaty, the principle of mutual recognition was formally given a treaty basis in Article 82 of the Treaty on the Functioning of the European Union (TFEU).[117] Simultaneously, Article 82(2) TFEU outlines the relation with minimum harmonisation of criminal procedural law. In its second paragraph, the article clearly states that (only) "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules." This description of the Union's competence indicates a clear connection to mutual recognition for cooperation in criminal matters in a cross-border context as the guiding criterion for minimum rules to be established with a facilitating purpose. As such, the procedural roadmap's measures and their subsequent Directives sparked a debate on their context and scope of operation, as the minimum procedural standards they contained and promoted moved beyond a strictly cross-border dimension and were also applicable in strictly domestic situations.[118]With scholars hackling the Commission's methodological choices "betraying a cavalier attitude to the limits of EU competence in this area" leaving itself open to "criticism of creeping competence"[119] and stating that the current procedural rights debate has lost the link with cross-border situations[120], it needs to be assessed whether or not the proposed Directive –as the most

[117] Art 82(1) TFEU clearly states that "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83."

[118] See, inter alia: *W. De Bondt & G. Vermeulen*, The procedural rights debate A bridge too far or still not far enough?, Eucrim, (4), 2010, pp. 163-167; Morgan, EHRLR 2012 (fn. 106); *R. Lööf*, Shooting from the hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU, European Law Journal (ELJ) 12(3), 2006, pp. 421-430; *G. Vermeulen & L. Van Puyenbroeck*, Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union. In M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. VandeWalle, T. Vander Beken, F. Vander Laenen, G. Vermeulen& G. Vynckier (Eds.), EU and International Crime Control, Antwerpen: Maklu, 2010, pp. 41-62; *G. Vermeulen*, Flaws and contradictions in the mutual trust and recognition discourse: casting a shadow on the legitimacy of EU criminal policy making & judicial cooperation in criminal matters?, in: N. Persak (Ed.), Legitimacy and trust in criminal law policy and justice. Norms, Procedures, Outcomes, Ashgate, 2014, pp. 153-175.

[119]Lööf, ELJ 2006 (fn. 118), pp. 421 & 426.

[120]De Bondt & Vermeulen, Eucrim 2010 (fn. 118), p. 164.

specific, binding outcome of measure E – focusing on specific safeguards for children will be "a bridge too far"[121] in the sense of having lost a clear connection with the cross-border context.

2. The proposed children Directive: Bending the rules…out of shape?

With the proposed Directive for specific safeguards for children, the Commission specifically targets a group of vulnerable defendants who seem less likely to be involved in criminal proceedings in terms of cross-border cases. Articles 1 and 2 of the Proposal clarify the subject and scope of the Directive. On the one hand, it lays down minimum rules concerning certain rights of suspects or accused persons in criminal proceedings that are children. As such, the proposal seemingly moves beyond the notion of a strict cross-border context and simply targets *any* child involved in *any* kind (both domestic and cross-border) of criminal proceeding. On the other hand, the Directive specifically targets children subject to a surrender procedure pursuant to a European Arrest Warrant EAW. The latter, therefore, defines the specific focus of the Directive on children in situations where their arrest and surrender are requested by a member state after they have fled to another member state in order to evade prosecution or the execution of a custodial sentence or detention order.[122] A critical observer may point to the fact that minors may face a considerable threshold – ready access to cash, credit and debit cards, means of transportation, driver's license, insurance, housing and accommodation opportunities, etc. – to effectively commit acts abroad resulting in a criminal offence with a cross-border dimension and the subsequent criminal proceedings and (mutual recognition of) the resulting judicial decisions. Truthfully, a similar observation[123] could be made regarding vulnerable adults. Yet, where the causal relationship between a person's age and that person's capacity to travel and cross borders seems fairly straightforward, it is, however, much more ambiguous to automatically assume the same for a mentally and/or physically impaired adult. The variety – and perceptibility – by which mental and/or physical features may restrict an adult in his capacity to travel unhindered (or unnoticed) make this a less evident exercise. As the

[121] De Bondt & Vermeulen, Eucrim 2010 (fn. 118), p. 164.

[122] Article 1 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190.

[123] This is not a mere personal assumption, but was also identified by the interim report on the study for the impact assessment of a measure covering special safeguards. The research team indicated that the approximations regarding the numbers of cross-border cased for vulnerable defendants were likely overestimated since minor delinquents or adult offenders may be less likely to travel outside of their place of residence than the general population. See: *G*|*H*|*K.*, Impact assessment of a measure covering special safeguards for children and other vulnerable suspected or accused persons in criminal proceedings (Interim Report for the study just/2011/EVAL-JPEN/FW/1017/A4), DG Justice, 2012, p. 59.

current initiatives only promote a proposal for a binding Directive for children, the specific reasoning for such an instrument, as well as the basis for EU competence in this matter, need to be scrutinised against the backdrop of the cross-border threshold. In the impact assessment accompanying the proposed Directive[124], the Commission has to admit that, in terms of cross-border cases, there is no precise information with regard to vulnerable persons arrested or prosecuted outside their own member state and that a 1% figure may be retained as representative of the cross-border cases concerning (all) vulnerable defendants.[125]As such, the impact assessment's figures do not seem to make a particularly strong case for necessary EU action regarding children in trans-boundary situations.[126]Both observations – the *disconnection* with a strict cross-border context in the first part of the definition of the Directive's subject and scope and the apparent limited practical use for an EU intervention in the area of European Arrest Warrants – raise the question as to which direction the EU is going with its procedural rights approach and which interpretation of Article 82(2) TFEU it upholds. The Commission's stance on this subject is clarified in the impact assessment, where it is said that the cross-border element is not (or no longer) the primary concern of the initiated proposal for the Directive. In a separate paragraph, aptly titled *Does the EU have power to act?*, it is stated that:

"This initiative will apply to all criminal proceedings *irrespective* of whether they present a cross-border element or not. The reason for this is that both the policy objectives as described below may only be met if minimum rules apply to all criminal proceedings. In order to improve mutual trust and thus judicial cooperation, judicial authorities need to be aware that sufficiently high standards apply across the board in the jurisdictions of other Member States. If Member States were at liberty to apply lower standards to purely domestic proceedings, the requisite of mutual trust between judicial authorities could not be boosted."[127]

Hence, the Commission seems to put its foot down in the ongoing debate on the necessary link with cross-border elements and mutual recognition of judicial decisions. With the cross-

[124]*European Commission,* COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal for a directive of the European Parliament and of the Council Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings /* SWD/2013/0480 final */, 2013.
Retrieved from http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52013SC0480.
[125] Ibid, p. 29, point 4.3. It is notable that the Commission (implicitly) acknowledges the arduous task of collecting solid information on vulnerable defendants in criminal proceedings throughout the EU, as is evidenced by the use of the woolly expression "data suggests".
[126] Moreover, in the interim report, the G|H|K, 2012 (fn. 123) research team does not address the "limited information vis-à-vis cross-border cases" like the Commission upholds, but that "little evidence has been found of vulnerable persons being arrested or prosecuted outside of their own member states".
[127]*European Commission* (fn. 124), p. 31, point 4.5.1.,para. 2.

border element apparently no longer a prerequisite for the Union to intervene, the assessment document provides three patterns underpinning the EU's competence to act:

- First, the scope of Art 82(2) is applicable "not only to cross-border criminal proceedings, but also to domestic cases as a precise, ex ante categorisation of criminal proceedings as cross-border or domestic is impossible in relation to a significant number of cases."[128]

- Secondly, the citation above states that minimum standards are necessary on a domestic level in order to build up confidence and trust between judicial authorities in case of cross-border cooperation.

- Thirdly, an interesting point is made where the Commission states:

> "As concerns the need to safeguard the fundamental rights of citizens, the enactment of minimum rules for cross-border proceedings only, far from addressing the problem, would create two different classes of defendants in criminal proceedings, one with more rights than the other; this distinction, made on the basis of the cross-border nature of the procedure, would lead to unreasonable differentiation and would eventually be detrimental to the protection of fundamental rights. *In addition, when the matter is linked to EU law, the Charter guarantees rights to everyone suspected of a criminal offence, whether involved in cross-border or purely national proceedings.*"[129]

The first two statements tend to follow the type of classic reasoning previously witnessed in the preceding Directives.[130] The first statement promotes the persuasion that it is better to be safe than sorry, and to prepare your domestic situation – i.e. justice system – up to an acceptable standard for when your criminal proceedings become of a cross-border nature. The second one follows a similar reasoning and aims to build up the trust necessary for smooth cross-border cooperation by working through a bottom-up method of inserting minimum standards on a domestic level, so that member states – when the time comes – will be able to be confident in each other's legal systems when issuing a cooperation measure.[131]Very similar to the reasoning at the time of construction of the previous Directives, the question remains as

[128]Ibid, p. 31, point 4.5.1., para. 1.
[129] Ibid, para. 3.
[130] Comprising measures A to D (See fn. 19 & 20).
[131] An in-depth debate on the merits of these claims would go beyond the scope of this article, but suffice it to say that the obviousness with which the EU links the introduction of procedural minimum standards to enhanced mutual trust and confidence is questioned. See, i.a.: Vermeulen, 2014 (fn. 118).

to how this should and will be appreciated given the indication above that very few suspects or offenders who are minors find themselves entangled in cross-border criminal proceedings. The third statement, however, firmly moves away from the cross-border perspective and defends the more radical notion of more and better justice for all throughout the EU.[132] The rationale for this is that confining the procedural minimum rights within a strict cross-border context would create a discriminatory context where individuals involved in domestic criminal proceedings may or may not be worse off. Moreover, the Commission makes a case for the notion that, as long as member states are acting within the scope of application of EU law, the EU's fundamental rights – via the Charter – are applicable regardless of a domestic or cross-border context. On both accounts, these are controversial arguments. In the first statement, the Commission implies that it no longer suffices to accept the diversity of (and between) the member states' internal criminal justice systems because they result in a discriminatory situation in which an individual, depending on the legal system applicable to him and whether or not he falls under a cross-border situation (and hence possible EU competence), is able to rely on either more or fewer rights. This seems poles apart from the *equivalence idea*[133] the Commission promoted at the start of the new era of cooperation in criminal matters where differences were acceptable because of the presupposed trust that a decision taken by a member state would always – throughout the diversity – adhere to an acceptable minimum (fundamental) standard. This may be understood in two ways: either the domestic standards fail to meet that presupposed minimum standard, therefore undermining the basic premises of mutual recognition and prompting an adequate response, or the Commission still considers the equivalence concept as intact, but wishes to push further for an EU-wide minimum harmonisation of criminal law beyond a cross-border context, therefore (out)stretching the competence interpretation of Art 82(2) TFEU. In the second statement, one cannot help but notice the ambiguity of the Commission's reasoning as it seeks to apply the CFREU beyond the condition that member states are acting within the scope of EU law.[134] According to Article

[132] As is rightfully pointed out by *Vermeulen* (Vermeulen, 2014 (fn. 118), p. 165), the 2009 Procedural Roadmap already made clear that the ambition of the instrument moved beyond 'fixing' trust issues in a cross-border mutual recognition context by stating in Recital 10 that "efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union." As such, Vermeulen argues that more and better justice for all throughout the EU is the "real bet".

[133] *European Commission*, Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM/2000/0495 final, 2000, point 3.1, para. 1 & 2. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52000DC0495:EN:HTML.

[134] An extensive disquisition on the relationship between EU fundamental rights, ECHR, and member states' fundamental rights provisions may be found in: *T. Marguery*, European Union Fundamental Rights and Member States Action in EU Criminal Law.

51(1), the Charter is addressed to member states only when they are implementing Union law.[135] The Court of Justice of the European Union (CJEU), in its 2013 preliminary ruling in the case of Åklagaren v. Hans Åkerberg Fransson confirmed that this covers *all situations* falling within the scope of Union law;[136] hence, the Commission's statement that the Charter's provisions apply in both a domestic and cross-border context is viable. Before this can be the case, however, it has to be established that an EU legal act calls for national implementing measures and thus that the Union had the material competence to exercise and submit such a measure.[137] As such, for the Commission, the sting is in the tail: on the one hand the delineated threshold for, and poor evidence of, cross-border situations involving vulnerable defendants puts pressure on the necessity (and therefore competency) to act under an Article 82(2) mandate. On the other hand, and more importantly, the Commission itself has made it clear that it wishes to apply a different rationale for introducing minimum standards for minors as vulnerable defendants, aberrant of Article 82's provisions. As such, the Commission wishes to derive a competency beyond the Treaty-based scope of Article 82(2) by referring to the provisions of the Charter of Fundamental Rights. Yet, this very instrument is applicable only in cases the EU has a legitimately established material competency to act in. Suffice it to say that a competency built on such circular reasoning has feet of clay. Whereas the EU's objective vis-à-vis procedural minimum rights is a noble cause in its own right, the fallacious competency discourse could thwart the entirety of the undertaking by culminating into a standoff on the principle of subsidiarity and the overstretch of EU power between the Union and the member states, not generally inclined to accept far-reaching interference with regard to their own national laws and policies.[138]

Maastricht Journal (MJ), *20*(2013/2), 2013, pp. 282-301. *Marguery* (p. 282) clearly states that applying EU-fundamental rights to member states' actions is subject to the condition that member states are acting within the scope of application of the EU law.

[135] Literally, Art 51 (1) states: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

[136]*European Court of Justice* (ECJ) 26.2.2013, case C-617/10 (*Åklagaren v. Hans ÅkerbergFransson),* [2013] OJ C 114/08, para 19.

[137]Marguery, MJ 2013 (fn.134), p. 287.

[138] A similar indication – at the time of the construction of the proposal for a Framework Decision on procedural safeguards – may be found in: Brants, 2005 (fn. 59), p. 105.

III. A brief look at the Commission Recommendation

In order to fully grasp the Commission's progress in its quest for procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, the Recommendation[139] requires some brief assessment. In general, the instrument seems innovative in that it specifically aims at a presumption of vulnerability and the identification of such vulnerability in persons involved in criminal proceedings.

First and foremost, the Commission recommends member states to foresee a presumption of vulnerability for certain persons in their legal systems, as will be indicated in the chapters below; this presumption particularly focuses on vulnerability as a result of mental disorders and to a lesser extent physical impairments.[140]Furthermore, it promotes the prompt and qualitative identification and recognition of such persons by ensuring that all competent authorities may have recourse to a medical examination by an independent expert, and that police officers, law enforcement and judicial authorities competent in criminal proceedings, should receive specific training to adequately deal with vulnerable persons.[141] Apart from these novel suggestions, recommendations are made to ensure the right to medical assistance and the audio-visual recording of questionings.[142] An intriguing aspect is that the Recommendation seems to draw from the English & Welsh method where it promotes the presence and assistance of a(n) (appointed) legal representative or appropriate adult during police station and court hearings.[143] A direct link with the cross-border context is made where the instrument recommends that "the executing member state should ensure that a vulnerable person who is subject to European Arrest Warrant proceedings has the specific procedural rights referred to in this Recommendation upon arrest".[144]

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[139]*European Commission* (fn. 116).

[140] Ibid, Recommendation 7 (under section 3). See infra chapter IV. B. on the link between this approach and the Commission's rationale vis-à-vis the absence of a workable definition for vulnerable defendants and mentally disordered defendants.

[141] Ibid, Recommendations 4 (under section 2) and 17 (under section 3).

[142] Ibid, Recommendations 12 and 13 (under section 3).

[143] Ibid, Recommendation 10 (under section 3). The added value of this explicit reference in the Recommendation is debatable, as the measures C&D-based Directive already – at least partially – resolves the issue of legal representation and communication with relatives. For the England & Wales connection, see Para. 3.15 of the Code of Practice for the detention, treatment and questioning of persons by police officers, available via:http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/. On the appropriate adult provision see, i.a.: *National Appropriate Adult Network,* Appropriate adult provision in England & Wales. Report prepared for the Department of Health and the Home Office, 2010. Retrieved from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117683/appropriate-adult-report.pdf

[144]*European Commission* (fn. 116), Recommendation 16 (under section 3).

The identified recommendations have the potential to have a beneficial effect on the identification of a vulnerable person and thus ameliorate the procedural rights and effective participation in (cross-border) criminal proceedings. Nonetheless, further consolidation is needed given the general and vague nature of some of these suggestions. A minimum qualitative definition of an independent expert should be provided and the specific training needs to be specified and matched again with a qualitative threshold. The presumption of vulnerability still leaves too much room for interpretation as to how and where this presumption needs to be 'foreseen' and one may wonder whether generalising a certain member state's specific approach across the diverse European countries will be counterproductive. From the mental perspective – and one clearly envisioned as a primordial part of the presumed vulnerability according to recommendation seven – the immense variety by which mental disorders may impact on proceedings implies that additional safeguards in order to ensure the defendant's procedural rights will have to be more tailor-made. For now the biggest obstacle to effective results and improvements, however, remains the instrument's non-binding form. As a purely suggestive instrument, it leaves the addressees with the mere suggestion to report back and inform the Commission on the follow-up on the recommendations within 36 months of its notification.[145]

IV. Establishing vulnerability through diversity and demonstrated needs. A plea for an adequate approach towards mentally disordered defendants

Notwithstanding the critical observations above, the core of the initiatives – creating special safeguards for vulnerable defendants as a specific category of people involved in criminal proceedings in need of extra attention and defence opportunities – serves a noble goal. Apart from the discussion on the EU's ambiguous competency tactics, however, the policy choices made with respect to this goal need assessment. In the previous chapter, the Commission's Recommendation was evaluated on its flaws and merits, the biggest obstacle remaining its essentially non-binding character. The following paragraphs assess the Commission's rationale – based on three propositions – for its policy choices and make a case for an effective and adequate instrument for mentally disordered defendants. From a competency and policy perspective, such an instrument seems both feasible and imperative.

[145] Ibid, Recommendation 18 (under section 3).

1. Vulnerability is in the eye of the beholder. Under identification of mental impairments in criminal proceedings

Measure E aims to show special attention to suspected or accused persons who, due to age, mental or physical conditions, cannot understand or follow the content or the meaning of the proceedings.[146]As such, the measure comprises a broad spectrum of possibly vulnerable defendants. The presented instruments, however, make a distinction from the start by delineating said vulnerability along the line of the age of the person involved. Up to a certain age limit, it is presumed (and for good measure: rightfully so) that every minor suspect or offender – with or without an additional mental or physical condition – presents a specific chance for vulnerability. Once this limit is reached, the specific mental or physical condition(s) from which a(n) (adult) person involved in criminal proceedings suffers need to be identified and assessed in order to establish this individual's vulnerability. Both evaluations, while undoubtedly influencing an individual's capacity to understand and participate in the proceedings, are based on considerably different grounds and hence require a diversified approach. When assessing an individual as vulnerable as identified by measure E in a strictly domestic context, the starting point will always be the screening and detection of said vulnerability once the individual has been apprehended. Hence, an immediate discrepancy becomes clear. Where a person's age consists of an objectified constatation[147] and, similarly, a diminished capacity to equivalently participate in the proceedings due to a physical condition could be considered as being sufficiently objectionable[148], the determination of a diminished capacity based on a mental condition still forms a contentious undertaking.[149] To a large extent less distinct upon first sight and subsequently more complex to evaluate in terms of capacity and vulnerability, establishing the mental condition of a person involved in criminal proceedings– and acting accordingly –constitutes an exceptionally sensitive and complex exercise. Without compromising the vulnerability of suspects or offenders of minor age or with a physical impediment and by no means disclaiming their need for specific safeguards, it

[146]*Council of the European Union* (fn. 111), p. 3, Measure E.
[147] E.g. Date of birth retrieved from birth certificate, passport, etc.
[148] E.g. Accessibility of the places where the proceedings take place, availability of adequately adapted accommodation during the proceedings, etc.
[149]In Annex II (Overview of stakeholder views on key elements of the proposed measures) of the impact assessment – *European Commission* (fn. 34) – accompanying the proposed Directive for special safeguards for children, the European Criminal Bar Association indicates the same conviction in its considerations where it is stated in para. 10 that "It is very difficult to define "vulnerable" except in relation to Children and Minors who may be identified by their age."

remains the case that the very starting point for establishing vulnerability remains much more problematic for (adult) defendants with a mental disorder. For one, various EU-wide studies have indicated the existing diversity, but also the substandard level, of the screening and detection mechanisms available in the member states' legal systems.[150] Hence, from the starting point of an adequate establishment of vulnerability, an individual involved in criminal proceedings while subjected to a mental disorder, may be deemed as being in a disadvantageous position.

This lack of identification of adults with a mental disorder has a potentially grave impact on the data of vulnerable defendants in cross-border criminal proceedings. The scarcity of information[151] on detected vulnerability due to a mental impairment combined with substandard screening methods and a general lack of identification imply, at least, the possibility of a much higher number of mentally vulnerable persons involved in cross-border proceedings that slip through the net. The observation that "overall, the shortage of evidence in the field of psychiatric prevalence and mental health care in prisons is nothing less than dramatic" and that "even the most rudimentary health reporting standards for mental health care in prisons are lacking almost everywhere in Europe"[152] opens the door to gross neglect of mentally-oriented vulnerability both in domestic and cross-border context and both for juvenile and adult defendants. From a policy point of view, this necessitates prompt and adequate EU action in order to guarantee effective procedural safeguards.[153] Moreover, contrary to the above mentioned issues surrounding the Directive for children inciting the Commission to boldly twist the Treaty based competence, the (scarcity of) statistics on mentally ill individuals seem to be in the Commission's favour. A potentially considerable group of (adult) individuals

[150] There are no recent EU-wide results available on how (early) screening procedures in the pre-trial and trial phase are implemented across Europe, but the results of recent EU-wide studies indicating that qualitative screenings for mental disorders within European prisons do not take place in a consistent manner are an alarming indication. See, *i.a.*: *G. Vermeulen, A. Van Kalmthout, N. Paterson, M. Knapen, P. Verbeke & W. De Bondt*, Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures, IRCP Series (vol. 40), Antwerpen, Belgium; Apeldoorn, The Netherlands: Maklu 2011; *G. Vermeulen, A. Van Kalmthout, N. Paterson, M. Knapen, P. Verbeke & W. De Bondt*, Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States, IRCP Series (vol. 41), Antwerpen, Belgium; Apeldoorn, The Netherlands: Maklu, 2011.; Dressing, Salize & Gordon, EP 2007 (fn.9); Dressing & Salize, APS 2006 (fn. 9); Blaauw, Roesch & Kerkhof, IJLP 2000 (fn. 9); Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9).

[151] This scarcity is lamented by all of the studies under fn. 57. See, i.a.: Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), p. 6.

[152]Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), p. 71.

[153] A recent report of Fair Trials International – following research on the protection of fair trial rights across the EU – indicated that "there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or those who are otherwise vulnerable, understand the proceedings in which they are involved are treated fairly". See: *Fair Trials International*, Defence Rights in the EU, 2012. Retrieved from: http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf.

with a mental impairment involved in criminal proceedings remains undetected, even across the borders of the Union's member states. Hence, there would be no need to overstretch Article 82(2) TFEU's interpretation to vindicate EU action in this specific area.

2. The lack of an overarching definition for a vulnerable adult. A legitimate justification or a practical excuse?

Notwithstanding this considerable part of the European population potentially remaining unidentified and insufficiently safeguarded, the Commission, in the Executive Summary of the Impact Assessment, explains its choice to stick to a recommendatory instrument by stating that the difficulty to determine an overarching definition – since there is no international or European legal instrument defining a vulnerable adult – and the existence of fewer relevant international standards and provisions for vulnerable adults ruled out taking legally binding action.[154]While it is true – and alarmingly so – that there are no binding international or European norms and standards that specifically address vulnerable adults[155], the impact assessment omits to clarify why this should result in a strictly non-binding Recommendation, despite the "rather lukewarm appreciation of the value of such an approach"[156]the assessment itself indicates[157], just as it refuses to engage in an in-depth analysis, why the difficulty of a lacking definition should halter the construction of binding legislative initiatives, or why the option of defining the term vulnerable adult was discarded.[158] Once again indicative of the assessment's employed spurious rationale, the European Parliament's Ex-Ante Impact Assessment Unit further wonders "why this difficulty [the lack of a definition] has not stopped other pieces of legislation already being adopted in the same field with specific provisions

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[154]*European Commission*, Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the Proposal for Measures on special safeguards for children and vulnerable adults suspected or accused in criminal proceedings, SWD (2013) 481 final, 2013, p. 7, para. 1.
Retrieved from: http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0481_en.pdf.

[155] Not just defining them, but also vis-à-vis their screening and detection, procedural safeguards, accommodation, etc.

[156] The impact assessment – *European Commission* (fn. 31) – itself indicates little or no improvement or impact by working through a Recommendation. This unconvinced approach also struck the European Parliament currently assessing the Commission's initiatives and proposed Directive. See: *A. Davies*, Initial appraisal of a European Commission Impact Assessment European Commission proposal on procedural safeguards for children in criminal proceedings, Ex Ante Impact Assessment Unit, Directorate C for Impact Assessment and European Added Value, Directorate-General for Parliamentary Research Services (DG EPRS), European Parliament, 2014, p. 4.
Retrieved from: http://www.europarl.europa.eu/RegData/etudes/note/join/2014/528785/IPOL-JOIN_NT%282014%29528785_EN.pdf.

[157] Moreover, the fact that a first assessment of the progress made regarding the Proposed Recommendation would not be until three to four years following its publication indicates a lack of urgency to come up (back) with an adequate instrument, see: *European Commission* (fn. 154), p. 7.

[158]Davies, *2014* (fn.156), p. 4.

referring to vulnerable persons (e.g. Directive 2013/48/EU on access to a lawyer)".[159] So rather than to seize the opportunity to (at least) investigate the viability of a common EU-wide understanding of vulnerability, the Commission suffices by stating that it is difficult and therefore unfeasible.[160]

In the Recommendation, somewhat paradoxically, the Commission itself seems to suggest a general definition for a vulnerable person by stating that such a vulnerable person is a "suspected or accused person who is not able to understand and to effectively participate in criminal proceedings due to their age, their mental or physical condition or disabilities."[161] Yet, by already delineating a presupposed –due to general European consensus – vulnerability for children, this common definition would primordially focus on adults with either a mental or physical impairment. As aforementioned, the hiatus of a binding instrument comprises a particular risk for mentally disordered individuals as they consist of a less apparent and consistently under-identified population. In order to guarantee their procedural safeguards, an adequate presumption of vulnerability for this particular population is needed. The Commission would not have to start from scratch to create a presumption of vulnerability in a context of mental illness, as it may avail itself of already existing doctrines. Both the European Convention on Human Rights (ECHR)[162] and the European Court's case law[163], have spoken out regarding persons with an *unsound mind*. While the Court stated in its Winterwerp judgment that the Convention did not define what is to be understood as a person of unsound mind and that such a definitive description or interpretation cannot be given due to the continually evolving concept of mental illness (and the society's attitude towards it)[164], it does provide for certain safeguards such as the need for objective medical expertise to establish a true mental disorder before a competent national authority, the degree-threshold for a mental disorder to warrant compulsory confinement and the need for a disorder's persistence to validate a continued

[159] Ibid, p. 5.
[160] One can also not help but notice that, while indeed a general consensus on the age of majority vis-à-vis children exists and therefore the delineation of their vulnerability 'as children' is accepted, there still is great diversity between the member states' legal systems regarding the age for criminal accountability, the procedural elements regarding referral to (adult) criminal courts, etc.
[161] *European Commission* (fn. 116), Recital (1).
[162] Article 5, 1, e. ECHR states that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants".
[163] The European Court of Human Rights (ECtHR) has, since its Winterwerp ruling in 1979, consistently maintained its original views on the Convention's 'unsound mind' doctrine. See: *Winterwerp v. the Netherlands*, Application no. 6301/73, Judgement 24 October 1979.
[164] *ECtHR, Winterwerp v. the Netherlands* (fn. 70), margin no 37.

confinement.[165] Departing from the notion that a definitive description of a mental disorder is neither feasible nor preferable, the EU should not hide behind it, but focus on creating awareness and recognition of vulnerability due to such a disorder. In the first place, this should be achieved through prompt, objective and qualitative identification of the latter, subsequently enabling the defendant's fundamental (procedural) rights. Once again in a conflicting, perhaps even perplexing rationale, the Commission *does* provide a suggestive definition of presumed vulnerability for "[in particular] persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings."[166] On the one hand, dismissing any effective action on the subject as unattainable because of the definition crux, only to provide two workable definitions on the other, seems to imply a convenient, practicable reasoning by the Union, rather than one instigated by a legitimate cause to tackle vulnerability in a comprehensive manner. With these considerations in mind, it seems an inexcusable omission to leave – in particular – mentally impaired defendants without a legitimate and effective instrument simply due to the practical consideration that it would be an arduous task to do so.

3. The need for an integrated approach

A final observation regarding the Commission's delineated approach between children and the 'bulk' of other vulnerable individuals, is that physical or mental impairment – unlike the distinction between a minor and adult defendant – is unrestricted by age. By creating a powerful instrument-to-be with the proposed Directive for minors while neglecting to do so on a general basis for *all* possible types of vulnerability, the Commission undermines the efficacy of the Roadmap's goal to create procedural safeguards for all vulnerable defendants, but also the proposed Directive itself. Once more with reference to the difficulty of detecting a – prevalent – mental illness, attributing vulnerability solely on an age criterion would forego the reality that (juvenile) delinquency is often related to mental health related issues.[167] By the

[165] Ibid, margin no 39.
[166] *European Commission* (fn. 116), Recommendation 7.
[167] A large amalgam of reports is available on the link between juvenile suspects and offenders and mental health/mental illness. The International Juvenile Justice Observatory (IJJO) reports on the subject on a regular basis. For a voluminous and comprehensive European Comparative Analysis, see: *International Juvenile Justice Observatory (IJJO)*, Mental Health Resources for Young Offenders - European Comparative Analysis and Transfer of Knowledge, 2008.
Retrieved from:

same token, a relatively convenient establishment of a person's – be it of minor or adult age – vulnerability due to physical incapacity could be made complex by coexistent mental illness. Hence, an integrated approach imposes itself in order to guarantee that *all* fronts are covered in guaranteeing necessary safeguards for the vulnerable population in criminal proceedings. The Commission's Recommendation, unrestricted by the age criterion of the proposed Directive, is satisfactory in this perspective, but ultimately remains a mere suggestive, non-binding entity. An effective instrument is imperative to ensure an integrated approach towards vulnerability.

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http://www.ipjj.org/fileadmin/data/documents/reports_monitoring_evaluation/IJJO_MentalHealthResourcesForYoungOffendersVol1_2011_EN.pdf.

V. Conclusion

With the two new initiatives stemming from the Roadmap's measure E, the Commission embarks on a noble mission of enhancing the protection for a category of defendants in criminal proceedings that are specifically vulnerable due to age, mental or physical conditions. Rightfully aiming at providing better procedural safeguards, the Commission's policy choices and underlying rationale indicate a number of flaws with the potential to jeopardise the entirety of the set out goals. In the first place, the Commission risks overplaying its hand by flexibly interpreting Treaty and Charter-based provisions in order to establish a newfound type of – possibly overstretched – competence. Proposing legally binding legislation consisting of a set of procedural rights for an age-related category of persons less likely to be involved in cross-border criminal proceedings while justifying this approach through a newfound competence severed from the basis provided in the TFEU might just be the proverbial bridge too far for the member states. On the one hand, pushing the envelope competency-wise, the Commission in contrast seems terribly prudent when delineating its tactics to combat vulnerability in all its (other) aspects. Full attention is dedicated to children as vulnerable defendants due to the consideration that a widespread consensus already exists on their vulnerability, definitions and handling. The ascertainment by the Commission that no binding international norms and standards directly deal with other vulnerable defendants, however, does not spark an in-depth comprehensive instrument, but prompted them to introduce an approach that in their own words has very limited potential of factually improving anything for the better on a procedural level. As a result, the choices made vis-à-vis the vulnerability policy leave a bitter feeling. Restricting the proposed Directive to children falls short of adequately tackling issues related to vulnerability throughout the EU, where, in order to justly deal with vulnerable subjects, an effective identification of their cause of vulnerability is necessary. A most pressing issue, and admittedly a complex one to grasp, is the overarching role of mental illness in a criminal context. Unrestricted by age, gender or physical capacity, mental disorder is often a coexistent stimulant for aberrant, possibly criminal behaviour that remains woefully under- or inadequately detected. Hence, there is a dire need to create additional safeguards as regards screening, detection and identification for both adults and children impaired by a mental condition as they tend to be less obviously visible and risk slipping through the net. By the same token, the problematic screening and detection – and as such, lack of identification – of

mentally disordered adults in combination with a more probable cross-border mobility would imply that the creation of a binding instrument would be more in accordance with the terms of competency embedded in Article 82(2) TFEU.

Chapter 2. The right to effective participation in criminal proceedings

The analysis of the EU's competence to introduce binding minimum standards for vulnerable defendants based on their mental disorders already demanded attention for the under-identification of the latter and criticised the omission of a flexible and workable definition of a (mentally) vulnerable adult. Under this heading, the research delves deeper into the specificities of criminal proceedings and focuses, with its second research line, on the right to effective participation in criminal proceedings and the need for additional protection for mentally disordered defendants.[168]

For this purpose, the research focuses on the procedural situation of mentally disordered defendants in Belgium and England & Wales. The choice for these member states is due to the fact that the legal systems of these countries encapsulate differing traditions for the procedural position of defendants. On the one hand, the Belgian legal system is situated within a continental civil law legal tradition. The pre-trial aspects of criminal procedure in Belgium have an inquisitorial nature, where the government's public authority – 'het openbare ministerie'[169] – leads the criminal procedure and carries the burden of proof.

The legal system in England and Wales, on the other hand, derives from common law principles that require the prosecution to be situated in an adversarial context. As a result, the latter legal tradition inherently puts more emphasis on the importance of individual procedural rights.[170] By examining the position of mentally disordered defendants in criminal proceedings in these distinctive jurisdictions, the research draws conclusions that are valid at both national and European levels. Based hereupon, the research established whether or not the member states adhere to existing fundamental norms and standards in the context of the right to effective participation, whether the application of these existing norms and standards should be made

[168] Throughout this chapter, the term 'defendant' will be used, and no difference will be made in terminology between suspected and accused persons. This contribution only covers the situation of mentally disordered *adult* defendants.
[169] The Belgian variety of the public prosecutor.
[170] *N. Jörg, S. Field & C. Brants*, Are inquisitorial and adversarial systems converging?, in: P. Fennel, C. Harding, N. Jörg & B. Swart (Eds.), Criminal Justice in Europe – A comparative study, 1995, Oxford: Clarendon Press, pp. 41-56; *T. Vander Beken & M. Kilching*, The role of the public prosecutor in the European Criminal Justice Systems, Brussels, Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten, 1999; *P. Reichel*, Comparative Criminal Justice Systems (4th ed.), New Jersey: Pearson Prentice Hall, 2005, pp. 164-175.

more uniform and whether or not there is the need for the introduction of binding minimum standards through the EU's procedural roadmap.

I. Development and interpretation of the principle of effective participation.

The principle of effective participation was first developed in the case of Stanford v. The United Kingdom.[171] During the trial the defendant was placed in a specific dock rendering him unable to hear, *inter alia*, some of the evidence given. Applications by Mr. Stanford for leave to appeal against conviction on the grounds, *inter alia*, that he could not hear the proceedings were refused by a single judge and subsequently by the Court of Appeal. It was not in dispute between those appearing before the Court that the applicant had difficulty in hearing some of the evidence given during the trial. The Court also made it clear that Article 6 of the ECHR guarantees the right of an accused to participate effectively in a criminal trial. This right not only includes the right to be present, but also the right to hear and follow the proceedings. Nonetheless, the Court held that the applicant was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence and that had not already appeared in the witness statements. Hence, no violation of Article 6 was established.

In the joint cases of T. v. The United Kingdom and V. v. The United Kingdom[172], T and V were 11 years old when they were tried for and convicted of murder and abduction in circumstances that attracted considerable media attention and public interest. Their trial took place in the Crown Court and was conducted with the full formality of an adult trial. Court procedures were, however, modified to a certain extent given the defendants' ages at the time. The measures taken included arranging for the defendants to visit the courtroom prior to trial and giving them a 'child witness pack' to introduce them to court procedures, seating them next to social workers in a dock raised for the occasion so they were able to see the courtroom, having their parents and lawyers seated nearby and shortening the hearing times to reflect the school day, with regular breaks. Despite all these special measures, part of the applicants' claim before the Court was that they were denied a fair trial because they had not been able to participate

[171] Stanford v. The United Kingdom, Application no. 16757/90, Judgement 11 April 1994.
[172] T. v. The United Kingdom, Application 24724/94 & V. v. The United Kingdom, Application 24888/94, Joint Decision 16 December 1999.

effectively in the criminal proceedings against them, not only because of their young age, but also because of their mental conditions.

In T's case, there was psychiatric evidence that he was suffering from post-traumatic stress disorder and that this, combined with the lack of therapeutic work after the offence, meant that he had limited ability to instruct his lawyers and to testify in his own defence. In V's case, there was evidence that he had the emotional maturity of a younger child, that he was too traumatised and intimidated to give his account of events to his lawyers or the court, and that he was not able to follow or understand the proceedings. In finding that the applicants had been denied a fair trial, the Court felt that, unlike in *Stanford*, it was not sufficient that skilled and experienced lawyers could offer assistance to counterbalance the limitations resulting from their mental conditions so that they could effectively participate in the trial. Even the combination of legal representation with a specific package of measures to assist the defendants was deemed by the Court to be insufficient to guarantee the fairness of the proceedings. The Court found, *inter alia*, that it was unlikely that the applicants would have felt sufficiently uninhibited to consult their lawyers during the trial. The Court gave particular weight to the public attention that the case attracted. In addition, some measures, such as the raised dock, may have heightened the applicants' feelings of discomfort during the trial. Moreover, their immaturity and disturbed emotional states meant that they would not have been capable of cooperating with their lawyers outside the courtroom and of giving them information for the purposes of their defence.[173] Hence, the mere representation by a lawyer *may* not be sufficient to guarantee the fairness of the proceedings when the defendant is not inherently capable of actively participating in the proceedings.[174]

The Court's reasoning in the T. & V. cases suggests that the Strasbourg institutions view effective participation as requiring a sufficient level of active involvement from the defendants in their trial and in its preparation. In S.C. v. The United Kingdom[175], a case that bears much resemblance to those mentioned above, the Court further elaborated on the effective participation standard, and explicitly noted that: effective participation presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for

[173] ECtHR, T. & V. v. the United Kingdom (fn. 172), para. 88.
[174] Law Commission, Consultation Paper no. 197 unfitness to plead, 2010, para. 2.96. Retrieved via: http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf.
[175] S.C. v. The United Kingdom, Application no. 60958/00, Judgement 15 June 2004.

him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he or she disagrees and make them aware of any facts which should be put forward in his defence.[176]

The Court, however, also stated that Article 6 of the ECHR does not require defendants to understand or to be capable of understanding every point of law or evidential detail. [177] Given the sophistication of modern legal systems, many adults of normal intelligence are unable to comprehend fully all the intricacies and exchanges that take place during proceedings. This is why the ECHR, in Article 6(3)(c), emphasises the importance of the right to legal representation.[178]

Although the aforementioned judgments concerned trials of minors who were committed to an adult court for jury trial, the considerations of the Court are general in nature and apply to all defendants.[179] Similarly, the considerations of the Court also apply to civil law countries, even when the case law mentioned belonged within the context of a common law system that was characterised by adversarial procedures. This was endorsed in the cases of Liebreich v. Germany[180] and G. v. France.[181] In these cases, the Court reconfirmed the several cumulative conditions that ensure there is effective participation[182] (G. v. France, para. 52), as described in S.C. v. The United Kingdom.

Although the case law is clear on the fact that this principle is to be followed during both the pre-trial and the trial phase, the Court has not yet set clear-cut conditions as to when (and which) measures need to be instigated in order to assist mentally disordered defendants to participate in the proceedings. There is some logic to this, in the light of the many ways in which psychiatric disorders may externalise and impact on an individual's cognitive abilities. As a

[176] S.C. v. The United Kingdom (fn. 175), para. 29.
[177] Ibid. fn. 203.
[178] *A. Mowbray*, Cases, Material and Commentary on the European Convention on Human Rights, Oxford: Oxford University Press, 2012, p. 426.
[179] Law Commission, 2010 (fn. 174), para. 2.95.
[180] Liebreich v. Germany, Application no. 30443/03, admissibility decision, 8 January 2008.
[181] G. v. France, Application no. 27244/09, Judgement 23 February 2012.
[182] ECtHR, G. v. France, (fn. 181), para. 52.

result, assessments on a case-by-case basis will have to be made in order to determine whether or not defendants will need to be granted measures, other than the mere assistance of a legal representative, to be able to participate effectively in the proceedings.[183] When additional measures are needed, it is up to the member states, and not the defendant, to provide the necessary assistance.[184] This mirrors the concept of the reasonable accommodation stemming from the UN Convention on the Rights of Persons with Disabilities (UN CRPD). [185] The UN CRPD prescribes that *reasonable accommodation* is necessary for people who are disabled. This reasonable accommodation means: "necessary and appropriate modification and adjustments where needed in a particular case, in order to ensure that persons with disabilities enjoy or exercise on an equal basis with others all human rights and fundamental freedoms."[186] More importantly, within the context of legal proceedings, Article 13 of the UN CRPD states that "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages". In order to help to ensure effective access to justice for persons with disabilities, "States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff".[187] The Convention and its principles tend to echo across Europe: Notably the Human Rights Court has since the Convention's entry, more than once, made reference to the latter to support its judgments.[188]

Naturally, there are limits to the positive measures member states may put in place to assist mentally disordered defendants during the proceedings. It follows from the case law that when, despite all the measures that are taken, the individual's cognitive capacities are insufficient to allow him/her to answer questions or to instruct his/her legal representatives, member states will have to provide a procedural solution to avoid the trial being labelled as unfair in the light

[183] Ibid. (fn. 181), para. 53.
[184] Ibid. (fn. 181), para. 53.
[185] United Nations Convention on the Rights of Persons with Disabilities and its optional protocol. 13.12.2006. http://www.un.org/disabilities/default.asp?navid=13&pid=150. The instrument was adopted by the United Nations General Assembly in 2006, opened for signature in 2007 and came into force in 2008, so – especially considering the preceding negotiations – around the same time as the developments leading up to the Roadmap on an EU level.
[186] United Nations Convention on the Rights of Persons with Disabilities and its optional protocol. 13.12.2006, Article 2.
[187] United Nations Convention on the Rights of Persons with Disabilities and its optional protocol. 13.12.2006, Article 13.
[188] See: Glor v. Switzerland, Application no. 13444/04, Judgement 30 April 2009; Z.H. v. Hungary, Application no. 28973/11, Judgement 8 November 2012.

of Article 6 of the ECHR. In these cases, a suspension of the trial (until the medical condition of the defendant has improved sufficiently so that he/she has the ability to stand trial) or a disposal of the case by diverting the defendant out of the criminal justice system seem to be the only just solutions. Continuing the proceedings in this context could lead to incomplete or untruthful information being given, which would put the whole trial at risk. In addition, forcing people who are not able to do so to give their views on what happened or who do not understand what is happening to endure the proceedings would not reflect well on a civilised legal system.[189]

Determining whether or not a mentally disordered defendant is able to participate effectively in the proceedings, and the additional procedural measures that need to be instigated, will depend on how the defendant's mental condition manifests itself during the criminal investigation and trial. The mere diagnosis of a mental disorder or disability does not imply that the person involved is unable to participate actively in the proceedings. Whether extra procedural protection measures are taken will therefore depend on the presence of thorough screening mechanisms to evaluate whether or not the mental state of the defendant begs for additional procedural aid. Although it is of crucial importance that these mental states are identified as early as possible, screening mechanisms should be available throughout the proceedings since it is possible that, over time, the mental condition of the defendant could evolve, for better or worse.

It is possible that the need for extra protection is immediately identified. Suspicion may be raised by disturbed behaviour, by the contents of witness statements or by the specific circumstances surrounding the case. In addition, the defendant him/herself, as well as his/her legal representative and/or relatives may point to the existence of a mental disorder or disability that will have an impact on the fairness of the proceedings.[190] In order to make the proceedings thoroughly safe, however, the police, prosecutors and judiciary need to introduce and apply targeted screening procedures and protocols so that individuals are not able to slip through the net. It is alarming to notice that no international norms and standards specifically address screening upon questioning and arrest. Even though no recent results are available on how screening procedures in the pre-trial and trial phases are implemented throughout

[189] Law Commission (fn. 174), para 1.10.
[190] Salize & Dressing, 2005 (fn. 1), p. 43.

Europe, the results of the EU-wide studies conducted by the Institute for International Research on Criminal Policy (IRCP)[191], which indicate that qualitative screenings for mental disorders within European prisons do not take place in a consistent manner, are discouraging in this regard.

Recent case law of the European Human Rights Court further clarifies that Article 6 of the ECHR guarantees the right of defendants to participate effectively in criminal proceedings from the earliest stage of police interrogation. Since the case law of the Court has clarified that people who are being questioned in relation to offences but who have not yet been formally charged should be covered by Article 6 of the ECHR, people arrested or detained in connection with a criminal charge also come within the ambit of this provision. This right starts to apply when the person is informed that (s)he is suspected of having committed an offence.[192] The Court has held that the right to a fair trial in criminal cases includes the right for anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself.[193]

Mental health conditions may cause significant problems in the light of these principles. A common feature of people suffering from a mental disorder or disability is that they may suffer from permanent or temporary reduced mental capacity. Hence, they are more likely than others to be confused and entangled, especially when additional stress factors, such as police questioning, arrest, trial and detention, come into play. People suffering from emotional problems (e.g. depression, psychosis or post-traumatic stress) and/or behavioural problems (e.g. autism, attention deficit hyperactive disorder, and maybe also individuals suffering from drug and/or alcohol related problems, such as severe withdrawal symptoms) are at risk of not being able to grasp the weight and consequences of the proceedings fully. Some of these individuals are likely to have difficulties in understanding and veraciously responding to questions, since they may have difficulties in recalling and processing information. They are also more likely to make damaging assertions, including false confessions, since they may be

[191]Vermeulen, Van Kalmthout, Paterson, Knapen, Verbeke & De Bondt, vol. 40 2011 (fn. 150); Vermeulen, Van Kamthout, Paterson, Knapen, Verbeke & De Bondt, vol. 41 2011 (fn. 150).

[192] See, *inter alia*, Panovits v. Cyprus, Application no. 4268/04, Judgement 11 December 2008, para. 67.

[193] See, *inter alia*, Funke v. France, Application no. 10828/84, Judgement 25 February 1993, para. 44; Saunders v. The United Kingdom, Application no. 19187/91, Judgement 17 December 1996.

acquiescent and suggestible and, under pressure, may try to appease other people or incriminate themselves.[194]

II. Effective participation in Belgium and in England and Wales

Based on the interpretation drawn from the Strasbourg case law, the research focus for this comparative exercise will be limited to an analysis of the presence and rigour of early detection mechanisms and the availability of extra-legal assistance for mentally disordered defendants in the legal systems of Belgium and England & Wales.

1. Early screening mechanisms

The English and Welsh regulations specifically address the importance of early detection mechanisms. The Police and Criminal Evidence Act 1984 (PACE) and the accompanying Code C of the Codes of Practice[195] state that it is the custody officer's responsibility to take the necessary measures once (s)he *suspects or is told in good faith that*, or is even *only unsure whether*[196] a person may be mentally disordered or mentally handicapped or mentally incapable of understanding the significance of the questions or of his/her own replies. Hence, if a solicitor is in any doubt about a detainee's mental state, he is allowed to make a request to the custody officer for assistance from an appropriate adult.

The manner in which these provisions are formulated tends to be so non-specific that the provisions cover nearly anyone who looks vulnerable. Since it is not necessary for the custody officer to obtain a professional diagnosis or guidance from a healthcare professional, this, at least legally, sets a very low threshold for treating defendants as vulnerable and, therefore, in need of extra procedural attention.

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[194] *T. Nemitz & P. Bean*, Protecting the rights of the mentally disordered in police stations: The use of the appropriate adult in England & Wales, International Journal of law and Psychiatry (IJLP), 24, 2001, pp. 595-605.

[195] Police and Criminal Evidence Act 1984 (PACE).
Retrieved via: http://www.legislation.gov.uk/ukpga/1984/60/contents; Code C Revised - Code of Practice for the detention, treatment and questioning of persons by police officers (Home Office 2012).
Retrieved via: http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/

[196] Para. 1.4 of the Code of Practice (fn. 194) states that "if an officer has any suspicion, or is told in good faith that a person of any age may be mentally disordered or mentally handicapped or mentally incapable of understanding the significance of the questions put to him or his replies, then that person should be treated as a mentally disordered or mentally handicapped person for the purposes of the code".

This focus on early identification was further intensified by the conclusions of the Bradley Report.[197] In 2007, Lord Bradley was commissioned to undertake a review of the treatment of people with mental health problems or learning disabilities in the criminal justice system. The report was published in April 2009, and set out eighty-two recommendations, which were all accepted in principle by the government. The overarching recommendation of the report was the need for even better and earlier identification and assessment of mentally vulnerable people in the criminal justice system, by means of better implementation of diversion schemes[198] ,coupled with improved sharing of information. The process of diversion implies that at various times on the offender's pathway dedicated services should make an assessment regarding the proper disposal of a specific case in terms of prosecution, remand, sentencing and resettlement. Diversion may occur at any stage of the criminal justice process: before arrest, after proceedings have been initiated, instead of prosecution, or when a case is being considered by the courts. Consequently, diversion schemes, which are run by medical staff, may be found in police stations, remand prisons and courts.

In stark contrast to the English and Welsh legislation and Codes of Practice, which are complemented by implementation schemes and training opportunities, regulations in Belgium concerning the identification of mentally disordered defendants do not have a fair-trial-rights-finality. When there are reasons to believe that a person is suffering from a mental disorder that could have an impact on, or nullify, the control of his/her actions, and in respect of whom there is a risk of reoffending because of this mental disorder, the Belgian prosecution authorities or courts may order a psychiatric expert report. In essence, this psychiatric report aims to establish whether or not the defendant is criminally accountable for the act(s) (s)he committed. In other words, the aim of this report is to establish whether or not this individual should be referred to a (secure) forensic psychiatry setting, instead of applying the Criminal Code to his/her case.[199] However, neither the identification by the police, prosecuting

[197] *K. Bradley*, The Bradley Report. Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system, London: Department of Health, 2009.
Retrieved via: http://www.rcpsych.ac.uk/pdf/Bradley%20Report11.pdf.

[198] *D. James*, Police Station diversion schemes: Role and efficacy in central London, Journal of forensic psychiatry (JFP), 11(3), 2000, pp. 532-555; *D.V. James*, Diversion of mentally disordered people from the criminal justice system in England & Wales: An overview, International Journal of Law and Psychiatry (IJLP), 33(4), 2010, pp. 241-248.

[199] Articles 1 and 10 'Wet van 9 april 1930 tot bescherming van de maatschappij tegen abnormalen en de gewoontemisdadigers' as changed by the Law of 1 July 1964 + Cass. 11 January 1983, R.W., 1982-83, 2114. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1930040930&table_name=wet. See also Articles 8 and 13 'Wet van 21 april 2007 betreffende de internering van personen met een geestesstoornis'; this law is intended

authorities or the courts, nor the identification by the psychiatrist, of a severe mental disorder is made with the aim of granting the defendant additional extra-legal assistance in order to be able to participate in the proceedings properly.

2. Extra-legal assistance

English and Welsh custody officers who suspect or are told in good faith, or have doubts about whether it is the case, that a person may be mentally disordered, mentally disabled or mentally incapable of understanding the significance of the questions put to him/her or his/her replies, are under a duty to appoint an appropriate adult (the AA)[200]. The underlying rationale for this protection measure is clearly indicated in the Note for Guidance, 11C: Although juveniles or people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible.

The appointment of the AA is therefore merely procedural in nature and is consistent with the effective participation principle as elaborated by the Strasbourg Court. Hence, the AA is not appointed in order that he/she might give guidance on whether the defendant should be diverted out of the criminal justice system because of his/her clinical needs.

There are three categories of individuals who qualify for acting as an AA[201]: a relative, guardian or other person responsible for the defendant's care or custody; someone who has experience of dealing with mentally disordered or mentally handicapped people, but is not a police officer or employed by the police; and, if neither of the above requirements are met, another responsible adult aged 18 or over who is not a police officer or employed by the police. The

to replace the 1930/1964 law, but is not yet in force. Given the series of delays, it is even doubtful whether it will ever become operational without some radical changes.
http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2007042101

[200] Para. 3.15 of the Code of Practice (fn. 194).

[201] Para. 1.7(b) of the Code of Practice - Notes for Guidance 1D.

Code of Practice, however, excludes solicitors as well as legal advisers from acting as the AA.[202] Currently no statutory authority is responsible for providing an AA service for vulnerable adults. The services therefore vary across the country. In nearly half of the country, some sort of organised project similar to services for juveniles is run, with appropriate adults (either paid or voluntary) being trained and supported. In other areas the service is ad hoc at best; the local social services emergency duty team (EDT) responds to requests only if they have no higher priority.[203]

Although they undoubtedly depend on how the defendant's mental condition manifests itself during the criminal proceedings, the duties of the AA are given specific content in the Code of Practice. The AA must, first of all, ensure that the defendant is informed of his/her rights and that (s)he has been cautioned, by insisting that this is repeated if the AA was not present at the police station at the time.[204] Secondly, the AA is allowed to request a legal adviser to assist in the defendant's case.[205] Thirdly, the AA plays an important role during police interviews. Save in exceptional circumstances, mentally disordered defendants must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or be asked to provide or sign a written statement, in the absence of the AA.[206] In addition, the AA does not have to act as a simple observer, and is allowed to advise the person being interviewed as well as to facilitate the communication between the defendant and the police. If the AA believes the interview is not being conducted fairly, (s)he is even allowed to interrupt or stop it.[207]

The situation in Belgium is, again, very different. Even if a psychiatric expert report states that the defendant is mentally disordered (whether or not this report also states that (s)he should be diverted from the criminal justice system), the regulations do not mention the possibility of

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[202] Notes for Guidance 1F.

[203]National Appropriate Adult Network, 2010 (fn. 143); *National Appropriate Adult Network*, The provision of appropriate adult services in England and Wales. Information for solicitors and legal representatives. Leaflet produced in consultation with the Law Society, 2011. Retrieved via: http://www.appropriateadult.org.uk/images/pdf/Representatives_Information.pdf.

[204] Paras. 3.15, 3.17 and 10.12 of the Code of Practice.

[205] Paras. 3.19 and 6.5(a) of the Code of Practice: "In the case of a person who is a juvenile or is mentally disordered or otherwise mentally vulnerable, an appropriate adult should consider whether legal advice from a solicitor is required. If the person indicates that they do not want legal advice, the appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person. However, the person cannot be forced to see the solicitor if they are adamant that they do not wish to do so."

[206] Paras. 11.15 and 11.18 of the Code of Practice.

[207] Para. 11.17 of the Code of Practice; *National Appropriate Adult Network*, National Appropriate Adult Network. Guide for appropriate adults, 2011. Retrieved via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117682/appropriate-adults-guide.pdf.

instigating extra-legal procedural protection involving a relative, a social worker or a healthcare professional in order to safeguard the fairness of the proceedings.

3. The law in practice

Although the written law in the compared jurisdictions seems to differ considerably, the situation in everyday practice may not be so different. Because of the very low threshold above which the police custody officer in England and Wales should call for an AA, it has been argued that a possible 25% of all suspects at police stations should receive this extra attention. This conclusion is, however, somewhat contrary to what happens in practice, since these provisions are used quite infrequently. [208] This conclusion is backed up by the National Appropriate Adult Network report of 2010, which states that "there appears to be a clear disparity between the number of adults identified as vulnerable in police custody and morbidity levels of mental disorder in prisons and offenders with either learning difficulties or disabilities", which suggests "that mental vulnerability is massively under-identified in police custody".[209] It is also clear from the Bradley Report and a Prison Reform Trust report of 2007 that many offenders end up in prison before any learning difficulties or mental health problems are identified.[210] These reports therefore rightly conclude that the apparent under-identification of mental vulnerability among adults in custody is concerning.[211]

Nemitz and Bean (2001) put forward three reasons for this phenomenon. First, they argue that the police have for too long simply been allowed by the courts to get away with ignoring these provisions. A second possibility may be that instigating additional protection measures is seen as disruptive, in the sense that calling an appropriate adult in a busy custody suite, making provisions for the visit, and delaying interviews is time-consuming. A third reason may be that police training is defective, and that custody officers are simply unaware of the legal requirements placed upon them or fail to detect vulnerable defendants. A solution to this latter problem, adopted in several large English and Welsh cities, has been the introduction of police station projects in which psychiatric nurses from the National Health Service are attached to

[208] Nemitz & Bean, IJLP 2001 (fn. 194).
[209] National Appropriate Adult Network, 2010 (fn. 143), p. 12.
[210] *Prison Reform Trust*, No one knows. Offenders with learning difficulties and learning disabilities, 2007. Retrieved via: http://www.prisonreformtrust.org.uk/uploads/documents/NOKNL.pdf.
[211] Ibid. fn. 210, p. 15.

police station custody suites. Their role is, *inter alia*, to improve the identification of mental problems.[212] In this regard, it is also encouraging to see that training events are continually being planned for police officers, improving their ability to detect mental disorders as quickly as possible.

Although these findings are worrying, the legislators in England and Wales closely monitor the case law from Strasbourg, and this has prompted a public debate on legal change. The Law Commission's consultation paper on unfitness to plead (2010)[213] and the Prison Reform Trust's report on vulnerable defendants in the criminal courts (2012)[214] are two textbook examples of the ongoing discussions in this context. In addition to the detection schemes mentioned above and the appointments of AAs, this debate has already led to more concrete results on extra-legal protection for mentally disordered defendants. Although the Strasbourg case law has largely developed with respect to child defendants, its principles were applied in relation to all categories of vulnerable defendants in England and Wales, by virtue of the Practice Direction[215] on vulnerable defendants. This Direction aims to assist the judiciary in making trial processes more accessible to vulnerable defendants by establishing that ordinary trial processes should "so far as necessary" be adapted and "all possible steps" should be taken to "assist a vulnerable defendant to understand and participate" in criminal proceedings.[216] Although the Practice Direction seeks to consolidate the procedure in relation to vulnerable defendants, a number of other practices have also been developed in the courts on a more or less ad hoc basis.[217]

In Belgium, on the other hand, no public debate has yet been initiated on this issue, and no measures have been put in place to provide for extra procedural protection for mentally disordered defendants.

The research establishes that Belgian law, both in theory and in practice, is unsatisfactory in the light of the Strasbourg case law, and that the situation in practice in England and Wales indicates not only that there is justifiable doubt about whether fundamental principles are

[212] James, IJLP 2010 (fn. 198).
[213] *Law Commission*, 2010 (fn. 173).
[214] *Prison Reform Trust*, Fair Access to Justice? Support for vulnerable defendants in the criminal courts, 2012. Retrieved via: http://www.prisonreformtrust.org.uk/Portals/0/Documents/FairAccesstoJustice.pdf.
[215] Criminal Practice Directions are handed down from time to time by the Lord Chief Justice and they apply in all criminal courts in England and Wales.
[216] Practice Direction (Criminal Proceedings: Consolidation October 2011), para. III.30. http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3#id6328221
[217] Law Commission, 2010 (fn. 173).

always adhered to, but also that these fundamental principles should become more anchored in everyday practice. As such, in the sphere of effective participation, there is an evident need for putting the Procedural Roadmap's Measure E into practice. The Commission Recommendation, though by its nature only suggestive, may serve as a necessary and inspirational vehicle to improve the procedural rights of mentally disordered defendants throughout Europe and to ensure that member states are able to cooperate within the mutual recognition framework without being challenged on the grounds that they are collaborating with other member states who do not respect defendants' fundamental fair trial rights.

Apart from improving the procedural rights that apply to everyone, regardless of their mental or emotional state, Measure E objectifies the general understanding that specific attention should be given to vulnerable defendants in order to safeguard the fairness of the proceedings, because individuals who are not capable of fully understanding or fully participating in the proceedings are a special category of defendants and, therefore, require a higher degree of protection. This is a logical consequence of the equality of arms concept, which requires a fair balance between the parties in court proceedings.

III. Conclusion

The research results clearly demonstrate the different approaches towards the protection of the procedural rights of this population in England and Wales and in Belgium. The fact that the two jurisdictions differ is, however, insufficient for the EU to adopt minimum standards across Europe. As mentioned in the Procedural Roadmap, minimum standards should only be adopted when the effective participation principle is not adhered to by the member states or when its application should be made more uniform in practice. The research has clearly shown that both these criteria are met. Belgian law, both in theory and in practice, is unsatisfactory in light of the Strasbourg case law. The situation in practice in England and Wales not only indicates that there is justifiable doubt that the effective participation principle is always followed, but also shows that the principle should become better anchored in everyday practice.

Recent research indicates that these conclusions may be extrapolated throughout Europe. Fair Trials International, together with the Dutch NGO EuroMoS, conducted a survey involving over one hundred defence lawyers from across the EU, including many LEAP[218] members, about the barriers to a fair trial existing in practice in their countries. The survey was questionnaire-based, and practitioners were not asked to set out legal rules but to concentrate on what happens in practice. The research also suggested that, in many member states, there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or suspects with another kind of vulnerability, are able understand the proceedings in which they are involved and are treated fairly.[219]

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[218] Fair Trials International (FTI) formed the Legal Experts Advisory Panel (LEAP) in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern, and to provide advice, information and recommendations to inform FTI's European policy position. LEAP now has more than 80 members from 24 member states.

[219] *Fair Trials International*, Defence Rights in the EU. Appendix 2, London: Fair Trials International, 2012. Retrieved via: https://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf.

Chapter 3. The European Arrest Warrant and mentally disordered suspects.

Looking back at more than a decade since the conception of the mutual recognition principle and the establishment of its flagship instrument, the European Arrest Warrant, the latter still remains the most successful mutual recognition product for cooperation in criminal matters in the AFSJ. Nonetheless, the EAW fell victim to its own success, with the excessive and disproportional use that was made of the instrument giving rise to criticism from practitioners[220] and academics[221] alike. Indeed the Arrest Warrant has become the to go to tool for member states to arrest and detain individuals suspected of having committed an offence. Under chapter 6 of this dissertation, the research established the problematic detention conditions for mentally disordered offenders in a post-trial phase and expressed concerns both from the point of view of the individuals involved and the effectiveness of the Framework Decision 909. Mutatis mutandis, the conclusions of this chapter[222] are applicable to the sphere of the EAW as well.

These conclusions, however, need to be considered *a fortiori* because of the pre-trial sphere in which the Arrest Warrant (primordially) operates: Detrimental detention conditions have an enormous influence on the wellbeing of any person deprived of their liberty, and the research has shown that this is exacerbated for the mentally disordered population. On top of that, the EAW is above all applied in the pre-trial phase, where an individual may be considered as a suspect, but remains innocent by law until legitimately proven guilty. NGO's like Fair Trials International[223] but also scholarly research[224] have consistently expressed the dire consequences of remand detention in the EU through the EAW and the often deplorable conditions under which this detention takes place. Notwithstanding that the EAW Framework Decision[225] clearly stipulates that "This framework Decision shall not have the effect of

[220] *European Commission*, Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States Brussels: 11.4.2011,COM/2011/175 Final.
Retrieved via: http://ec.europa.eu/justice/criminal/files/eaw_implementation_report_2011_en.pdf. In this report, the Commission already indicated the necessity – as identified by the member states – for a proportionality test to provide an answer for the excessive amount of EAW's being issued in Europe.
[221] *S. Haggenmüller*, The Principle of proportionality and the European arrest warrant. Oñati Socio-legal Series [online], 3 (1), 2013, pp. 95-106. Retrieved via: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200874
[222] Which was accepted as an Article in the International Journal of Law and Psychiatry, see infra.
[223] There are various publications and testimonies available on their website. Via: https://www.fairtrials.org/publications/.
[224] See, f.i.: Schunke, 2013 (fn. 80). In it, Schunke explores the infamous cases of Gary Mann, Andrew Symeou etc. and indicates the radical effects of (unrightful) pre-trial detention.
[225] Article 1, 3. of the EAW.

modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union", there is mounting evidence that this is indeed happening. Apart from the analogous establishment of the below par detention conditions, with particular reference to mentally disordered detainees in chapter 6, this chapter will look at whether member states have the right to refuse transfers under the EAW procedure based on this evidence. To do so, the study focused on the EAW case law and specific role of the European Court of Justice, as the Court holds the key to safeguarding the uniformity as well as conformity of European Cooperation in criminal cases in relation to the fundamental rights[226] and there is currently no common view within the Union as to how and when human rights can give rise to an exception with regard to the use of EAW's. This diversity causes the arrest warrant to operate in a legal limbo as far as fundamental rights are concerned, given that the framework decision itself only provides for limited grounds for refusal and refrains from explicitly mentioning the human rights exception.

In two well-known judgments, the Court found itself confronted with such a question in the wake of an EAW procedure. The Radu case and the Melloni case presented the court with a golden opportunity to dot the i's and cross the t's as far as the difficult relation between the EAW and the fundamental rights were concerned. In the first case, the Court had to pronounce itself on the relation between fundamental rights as included in the EU Charter and the ECHR and a requested European arrest Warrant.

In the Radu case[227], that was issued following a prejudicial question related to the implementation of EAWs, Romania, as sought executing state had not included the human rights violation clause as a grounds for refusal and now had reflect upon whether Mr. Radu was in a position to invoke the (flagrant violation of) the human rights included in the Charter and the ECHR[228] in order for his surrender to be refused. The Advocate General (Sharpston) in this case did not show herself averse to thorough reflections on the relation between mutual

[226] *P. Asp, N. Bitzilekis, S. Bogdan, T. Elholm, L. Foffani, D. Frände, . . ., & F. Zimmerman* , A manifesto on European criminal procedure law - European Criminal Policy Initiative. Zeitschrift für International Strafrechtsdogmatik 11, 2013, pp. 430-446.
[227] *European Court of Justice* (ECJ) 18.10.2012, case C-396/11, (Radu). Retrieved via: http://curia.europa.eu/juris/document/document.jsf?text=&docid=132981&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=482327.
[228] Part of the debate was also the question of whether fundamental rights should be considered as primary EU law since the Lisbon Reform Treaty, even if they were not foreseen as such at the time of the conception of the Framework Decision on the European Arrest Warrant.

recognition on the one hand and respect for fundamental rights on the other[229], and stated in her conclusion that ""While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice."[230] The Court, however, shied away from following Sharpston's engaging advice, limited its vision to one specific observation - *in casu* Radu not having been heard prior to the issuing of the EAW - and even on that account retreated to the familiar rhetoric on mutual trust between member states. Confronted with a context of European cooperation in criminal cases, the Court even seems to be stepping back from the rather progressive attitude adopted in the NS.-case (in the context of the common policy on asylum). [231] As such, in the Radu case, the Court chose defend – or even hide behind – the doctrine of mutual trust rather than pronounce itself on the existing thresholds - considered too high by the Advocate General Sharpston- to successfully refuse an European Arrest Warrant. Yet, as confirmed by the Advocate General in the Lopes Da Silva Jorge case[232], it would be rather absurd to assume that member states should accept the possibility of human rights violations for the sake of ensuring a smooth collaboration, as long as said violations are not spilling over the thresholds established in the ECHR and the Charter.

In the Melloni case[233], the Court concluded that a member state cannot apply a higher national standard of fundamental rights protection to refuse an issued arrest warrant that complies with the (lower standard of) protection established by the EU Charter. Once again, the Court

[229] Sharpston even opened the door for a more flexible approach regarding the 'flagrant denial' doctrine of the ECtHR, by stating that potential infringements should not be established 'beyond reasonable doubt'.
[230] Ibid. Conclusion of the Advocate General, para. 41.
[231] I needs mentioning, however, that the Court of Justice would perhaps have been more reluctant, should not the Human Rights Court had settled a similar discussion with "a resounding condemnation" in the case of MSS. v. Belgium & Greece. See: Mole, EHRLR 2012 (fn. 54)
[232] *European Court of Justice* (ECJ) 05.09.2012, Case C-42/11 *(cour d'appel d'Amiens /João Pedro Lopes Da Silva Jorge).* See also: *A. Tinsley*, The case Radu: When does the protection of fundamental rights require non-execution of a European Arrest Warrant? European Criminal Law Review (EuCLR), 2, 2012 (pp. 338-352), pp. 347-348.
[233] *European Court of Justice* (ECJ), 20.04.2013, case C 399/11 (Ministerio Fiscal/ Stefano Melloni). Via: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5f2bdb1932eb7422eb87fe1f08fa18fdf.e34KaxiLc3eQc40LaxqMbN4Oc34Le0?text=&docid=135894&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=735679.

confirms that any other assessment would work to the detriment of the fundamental principles of mutual trust and the recognition which the framework decision aims to enhance. This would moreover compromise the expediency of the framework decision given the uniformity of the fundamental rights protection, as established in the instrument, would be put up for discussion.[234] An important aspect of the Court's reasoning for this refusal was that the EU had already established an harmonisation pathway and therefore, that allowing a higher national level of fundamental rights protection would run counter to the aim of the provision to provide a common understanding of that refusal ground (in casu concerning in absentia decisions).[235] Hence, Janssens rightfully states that in areas where the EU legislator as established (common minimum) definitions at EU level, the member states' margin of action will be smaller in cases where no common definitions exist and that the principle of mutual recognition will be more powerful – with more limited exception to this principle – where approximation is available.[236] On the 24th of July 2015, the *Hanseatisches Oberlandesgericht* in Bremen, Germany, requested in a preliminary ruling to the Court of Justice in the *Aranyosi* case[237] - later joined with the Căldăraru case[238] by the Court – whether "Article 1(3) of the Council Framework Decision on the European arrest warrant is to be interpreted as meaning that extradition for the purposes of prosecution is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant? To that end, can or must the executing Member State lay

[234] Ibid. (fn. 233), Consideration 63.
[235] *H. Labayle*, Mandat d'arrêt européen et degré de protection des droits fondamentaux, quand la confiance se fait aveugle. Groupe de Recherche – Espace Liberté Sécurité Justice, 2013. http://www.gdr-elsj.eu/2013/03/03/cooperation-judiciaire-penale/mandat-darret-europeen-et-degre-de-protection-des-droits-fondamentaux-quand-la-confiance-se-fait-aveugle/print/; *R. van der Hulle & R. van der Hulle,* De arresten Akerberg Fransson en Melloni gerelativeerd, Tijdschrift voor Europees en economisch recht (SEW), J, March, 2014, pp. 102-116; *I. Armada*, The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a Fundamental Rights-Based Refusal the Solution? New Journal of European Criminal Law (NJECL), 6(1), 2015, pp. 8-31.
[236] *C. Janssens*, The Principle of mutual recognition in EU law, Oxford Studies in European Law, Oxford: Oxford University Press, 2013, p. 204.
[237] *European Court of Justice* (ECJ) 24.07.2015, case C-404/15 *(Generalstaatsanwaltschaft Bremen/ Pál Aranyosi).* Via: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=167520&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=869267*
[238] *European Court of Justice* (ECJ) 09.12.2015, Case C-659/15 PPU (*Hanseatisches Oberlandesgericht/ Căldăraru*).

down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?".

Only very recently, on the 3th of March 2016, the Advocate General Bot presented his Opinion on the joined cases of Aranyosi and Căldăraru.[239] Following a rather extensive exposition (including reference to the N.s. case – see chapter 6), the Advocate General concluded that Aricle 1(3) of the FD EAW must be interpreted in such a way that it does not constitute a motive to refuse cooperation and execution of a European Arrest Warrant, based on the risk of a violation of fundamental rights in the issuing member state. It is (solely) up to the judicial authorities of the issuing state to assess the proportionality and necessity of issuing a European Arrest Warrant.[240]

The complex relation between the fundamental rights and mutual recognition was deserving of a uniform approach and their role and place in want of clarification. While this is undoubtedly a crisp and clear answer from the Advocate General, its content may indeed be assessed as 'deeply troubling'[241] since it fully accords a higher legal status to the principle of mutual recognition than to (the protection of) the fundamental rights of the individual involved in EAW procedures. Moreover, the decision to issue an EAW and the assessment of the proportionality and justness hereof remains the sole prerogative of the issuing state. While non-legally binding, it remains to be seen how the Court will assess this conclusion and ultimately decide on its opinion.

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[239] *Y. Bot*, Conclusions de l'Avocat Général, Affaires C-404/15 et C-659/15 PPU, présentées le 3 mars 2016. Available via (French only): http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62015CC0404&qid=1458121305625&from=EN.

[240] Bot, 2016 (fn. 239), para 183 et sequitur: "L'article 1er, paragraphe 3, de la décision-cadre 2002/584/JAI du Conseil, du 13 juin 2002, relative au mandat d'arrêt européen et aux procédures de remise entre États membres, telle que modifiée par la décision-cadre 2009/299/JAI du Conseil, du 26 février 2009, doit être interprété en ce sens qu'il ne constitue pas un motif de non-exécution du mandat d'arrêt européen émis aux fins de l'exercice de poursuites pénales ou de l'exécution d'une peine ou d'une mesure privatives de liberté, fondé sur le risque d'une violation, dans l'État membre d'émission, des droits fondamentaux de la personne remise. Il appartient aux autorités judiciaires d'émission de procéder à un contrôle de proportionnalité afin d'ajuster la nécessité d'émettre un mandat d'arrêt européen au regard de la nature de l'infraction et des modalités concrètes d'exécution de la peine."

[241] See Fair Trials International and Antigone's Opinion Letter and request to the Commissioner for Justice, Consumers and Gender Equality Jourová here: http://statewatch.org/news/2016/mar/eu-european-arrest-warrant-ecj-bot-opinion-letter.pdf.

Chapter 4. The gathering and admissibility of evidence in relation to mentally disordered suspects.

The gathering of legitimate evidence is of crucial importance in any criminal procedure. In a cross-border, often multi-member state context, the need for clear principles and provisions on how to gather and collect evidence becomes even more apparent. With the new European Investigation Order Directive, the EU seems set to embark on a new era of cross-border cooperation at the investigative stage. The article below investigated the provisions of the European Investigation Order on their merits, and coupled it to an analysis of the identified difficulties in dealing with mentally disordered suspects at the investigative phase.

This article was submitted (awaiting peer review) to Psychology, Crime and Law:

M. Meysman, The European Investigation Order and mentally disordered suspects: Fit for purpose?, Psychology, Crime and Law. A1 Journal.

The European Investigation Order and mentally disordered suspects: Fit for purpose?

Abstract: By many standards, the European Investigation Order (EIO) may be considered as the first genuine instrument of a new generation based on the principle of mutual recognition in criminal matters. Aiming to firmly introduce the cross-border execution of investigative measures and the admissibility of evidence gathered abroad, the Investigation Order is resolute to introduce mutual recognition in the spectrum of all things evidence. Yet, from an historical perspective, the instrument incorporates 'classic' mutual legal assistance (MLA) features in a mutual recognition instrument and bodice. This article investigated the position of mentally disordered suspects against this backdrop to identify the implications of such an advanced cooperation. Based on the consensus that mentally disordered individuals cannot be assimilated with their regular counterparts, this article explores the presence of specific provisions in the European Investigation Order providing them with additional safeguards. Incorporating the recent European Commission Recommendation on additional safeguards for vulnerable defendants (comprising among others the mentally disordered) the article specifically focuses on the mutual recognition of hearing procedures and the admissibility of the evidence gathered herewith.

Keywords: mutual recognition – mentally disordered suspects – hearing – expert witness – European Investigation Order – fundamental rights - evidence admissibility

I. Introduction

During criminal procedures, few things are as important as the hearing/interrogation of defendants, victims and (expert) witnesses. This is also evidenced by the content of criminal records, predominantly composed of – formal (police) reports on – such hearings.[242] Whilst of primordial importance to finding the truth following a felony - and establishing the involvement of the suspect herein - it also places the suspect in particularly vulnerable position which can only be properly compensated for by the assistance of a lawyer who's task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.[243]

As such, the European Court of Human Rights acknowledges the particular vulnerability of an individual suspected of having committed a crime. For mentally disordered defendants, however, this vulnerability is explicitly present, rendering its establishment and adequate response hereto exceptionally urgent. The recognition of such an exceptional vulnerability is not only important with a view to the approach towards, and treatment of, mentally disordered suspects during criminal hearings, but also in terms of the validity of the evidence gathered as a result hereof. Against this backdrop, this article discusses the provisions of the European Investigation Order to assess its aptitude to include additional safeguards vis-à-vis mentally disordered suspects. Assuring that additional and adequate safeguards are in place for mentally disordered suspects is however but one fragment of the appropriate conduct. Such subsequent safeguards hinge on the satisfactory establishment of a person's vulnerability in the first place.[244] This identification - through an adequate screening and detection - of mental disorders is of crucial importance, since mentally vulnerable defendants are much more prone to making invalid, unjust or unreliable statements.[245] As such, the appointment and selection of experts in a satisfactory way is of crucial importance, not just to guarantee adequate

[242] *L. Mergaerts, D. Van Daele & G. Vervaeke*, Rechtsbijstand voorafgaand aan en tijdens het verhoor van kwetsbare verdachten: een complexe opdracht voor de advocaat. Rechtskundig Weekblad (RW), 36, 2015, pp. 1403-1413.
[243] Salduz v. Turkey, Application no. 36391/02, Judgement 27 November 2008, para. 54.
[244] *P. Verbeke, G. Vermeulen, M. Meysman & T. Vander Beken*, Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: Exploring the need for further EU action, International Journal of Law and Psychiatry (IJLP), 41, 2015, pp. 67-75.
[245] *S.M. Kassin & G.H. Gudjonsson*, The Psychology of Confessions. A Review of the Literature and Issues. American Psychological Society (APS), 5, 2004, pp. 33-68; *S.M. Kassin*, On the Psychology of Confessions. Does innocence put innocents at risk? American Psychologist (AP), 60(3), 2005, pp. 215-228; *R. Constantine, R. Andel, J. Petrila, M. Becker, J. Robst, G. Teague, T. Boaz & A. Howe*, Characteristics and experiences of adults with a serious mental illness who were involved in the criminal justice system. Psychiatric Services (PS), 61(5), 2010, pp. 451-457; *S.M. Kassin, S.A. Drizin, T. Grisso, G.H. Gudjonsson, R.A. Leo & A.D. Redlich*, Police-induced confessions: risk factors and recommendations. Law and Human Behaviour (L&B), 34, 2010, pp. 3-38.

safeguards for mentally vulnerable defendants, but also to ensure the validity of expert evidence. For the European Investigation Order's context, where investigative measures or the gathering of evidence are envisioned in a cross-border dimension, this article explores the question as to whether the diversity - both from a practical but also qualitative perspective - in the EU would render mentally disordered suspects vulnerable to discrimination or substandard protection during interrogations, simultaneously contaminating the validity of the evidence gathered and potentially hindering the envisioned cooperation in criminal matters in the European Area of Freedom, Security and Justice (AFSJ). For an ultimate check-up, the relevant provisions of the recent Commission Recommendation[246] on the procedural safeguards were included per chapter to assess their potentially added value for the position of mentally disordered suspects, bearing in mind their inherent suggestive, non-binding nature.

II. EU cooperation in criminal matters in the field of evidence gathering and investigative measures: a laborious journey.

On the 3rd of April 2014, the EU presented the Directive regarding the European Investigation Order in criminal matters (Dir. EIO) (European Parliament & Council, 2014).[247] Due to be transposed into the national laws of the member states by the 22nd of May 2017[248], the Dir. EIO shall serve as a comprehensive, single instrument with a view to gathering evidence. With the instrument – originally an initiative by a group of seven member states[249] in 2010 - the European Union (EU) seeks to further (or more aptly put: redeem and recommence) the gathering and transfer of evidence in criminal procedures between member states. In the past, the EU struggled to effectively introduce its flagship principle of mutual recognition (MR)[250] in an evidence context for cross-border cooperation in criminal matters. The EU's initial instrument, the European Evidence Warrant (EEW)[251] proved to be an instrument that was flawed both from a scope – targeting only the MR of evidence that was already gathered in the

[246] *European Commission*, Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. OJ C 378/8, 24.12.2013.
[247] *European Parliament & Council*, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 01.05.2014.
[248] Article 36 Directive EIO.
[249] Namely Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden.
[250] In conclusion 33, the Tampere Council indicated mutual recognition as 'the future cornerstone' for judicial cooperation in the EU. The establishment of the principle in EU criminal law was further developed over the course of the decade, see: *European Council*, Tampere European Council Presidency Conclusions, 1999. See: Bantekas, ELR 2007 (fn. 10); Vermeulen, 2008 (fn. 8); Mitsilegas, ELR 2009 (fn. 95); Janssens, 2013 (fn. 236).
[251] *European Council*, Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008.

sought member state – and policy perspective[252] with state implementation rates and effective EEW procedures commenced staying well below par.[253]

The reasons for this are many, from the observation that issues relating to evidence in criminal proceedings are among the thorniest ones[254] due to member state-specific features with states showing no enthusiastic approach, to the observation that the knowledge of the existence of the upcoming Dir. EIO as a more comprehensive instrument (aimed at replacing the EEW) in the minds of the member states prompts them to overlook or reject the EEW. Be as it may; for many years, an authority in want of cooperation in the field of evidence in criminal matters, was confronted with a fragmented legislative approach.[255] Member states seeking to obtain evidence abroad, had to manoeuvre mutual legal assistance (CoE, 1959; CoE 1978; Benelux, 1962; CISA, 1990; Council, 2000; Council, 2001)[256] and mutual recognition (Freezing Order, Council, 2003[257];EEW, 2008) instruments, with the latter already deemed unworkable.[258]

The Dir. EIO will now serve as a single, comprehensive instrument, combining both the flexibility available under the MLA instruments and some of the 'classic' MR features like terse time frames for enforcement, a standard EIO form and limited grounds for refusal[259], covering any investigative measures – with the exception of setting up joint investigation teams (JIT) – and the gathering of any type of evidence – safe for evidence gathered within such a JIT context.[260]

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[252]Vermeulen, De Bondt & Van Damme, 2010 (fn. 85); *W. De Bondt & G. Vermeulen*, Free movement of scientific expert evidence in criminal matters, In: M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, T. Vander Beken, F. Vander Laenen, et al. (Eds.). EU Criminal Justice, Financial and Economic Crime: new perspectives interest-based dispute resolution (Vol. 5), Antwerp, Belgium ; Apeldoorn, The Netherlands: Maklu, 2011, pp. 69-83.

[253] *S. Allegrezza*, Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality, in: S. Ruggeri (Ed.). Transnational Evidence and Multicultural Inquiries in Europe, Switzerland: Springer International Publishing, 2014, pp. 51-67.

[254] *R. Belfiore*, Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence, in: S. Ruggeri (ed.). Transnational Evidence and Multicultural Inquiries in Europe, Switzerland: Springer International Publishing, 2014, (pp. 91-105), p. 92; *T. Rafaraci*, General Considerations on the European Investigation Order, in: S. Ruggeri (ed.). Transnational Evidence and Multicultural Inquiries in Europe (pp. 37-44), Switzerland: Springer International Publishing, 2014, (pp. 37-44), p. 38.

[255]Allegrezza, 2014 (fn. 253); Belfiore, 2014 (fn. 254); Armada, NJECL 2015 (fn. 235).

[256] Council of Europe (1959). European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959. http://conventions.coe.int/Treaty/EN/Treaties/Html/030.htm; Council of the European Union (2000). Convention on Mutual Legal Assistance in criminal matters between the Member States of the European Union. OJ C 197, 17.07.2000. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF

[257] Council of the European Union (2003). Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. OJ L 196, 02.11.2003.

[258] *J. Blackstock*, The European Investigation Order, New Journal of European Criminal Law (NJECL), 1(4), 2010, pp. 481-498.

[259] Preamble (6) of Directive EIO. See also: *M. Daniele*, Evidence Gathering in the Realm of the European Investigation Order. From National Rules to Global Principles. New Journal of European Criminal Law (NJECL), 6(1), 2015, pp. 179-194.

[260] Article 3, Directive EIO.

In some ways, the Dir. EIO can be considered as the first genuine instrument of a new MR generation. It is the first effective MR instrument, in the form of a Directive, in the post-Lisbon era[261], the first MR instrument that will replace prior MR instruments (EEW and Freezing Order) and – after serious debate and scholarly unrest[262] – the first one to have an explicit – i.e. not just mentioned in the preamble – fundamental rights refusal ground.[263] With the latter included, the proverbial 'rush in the wrong direction'[264] turned into a more – moderately – positively[265] assessed 'milestone'.[266]

Nonetheless, the Dir. EIO needs to be analysed regarding its provisions on the gathering and admissibility of evidence specifically with a view to mentally disordered suspects. Starting from the premise that in a common area of freedom, security and justice, any form of discrimination among EU citizens must be avoided[267] and that the move towards more effective cooperation should not be detrimental to fundamental rights[268], this article looks at how attention was given to mentally disordered suspects with a specific focus on the hearing of the latter, provisions on the availability and aptitude of experts and the eventual assessment of the validity of such evidence.

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[261] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ C 306/01, 17.12.2007.

[262] *C. Heard & D. Mansell*, Fair Trials International's response to a European Member States' legislative initiative for a Directive on a European Investigation Order, 2010.
Retrieved via: http://www.fairtrials.org/documents/FTI_Submission_on_the_European_Investigation_Order_1.pdf; *S. Peers*, The proposed European Investigation Order: Assault on human rights and national sovereignty, 2010. Retrieved via: http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf; Blackstock, NJECL 2010 (fn. 258); *D. Sayers*, The European Investigation Order. Travelling without a 'roadmap'. CEPS Paper in Liberty and Security in Europe, 2011. Retrieved via:
http://www.ceps.eu/system/files/book/2011/06/No%2042%20Sayers%20on%20European%20Investigation%20Order.pdf; *R. Vogler*, The European Investigation Order: Fundamental Rights at Risk?, In: S. Ruggeri (ed.). Transnational Evidence and Multicultural Inquiries in Europe, Switzerland: Springer International Publishing, 2014, pp. 45-49.

[263] Article 1, 4. & Article 11 (1) (f), Directive EIO.

[264] *B. Schüneman*, The European Investigation Order: A Rush into the Wrong Direction, In: S. Ruggeri (ed.). Transnational Evidence and Multicultural Inquiries in Europe, Switzerland: Springer International Publishing, 2014, pp. 29-35.

[265]Allegrezza, 2014 (fn. 253); Belfiore, 2014 (fn. 254); *S. Peers & E. De Capitani*, The European Investigation Order: shaping a new approach to mutual recognition in criminal matters, 2014. Retrieved via: http://free-group.eu/2014/05/22/the-european-investigation-order-shaping-a-new-approach-to-mutual-recognition-in-criminal-matters/; Armada, NJECL 2015 (fn. 235).

[266] Peers & De Capitani, 2014 (fn. 265).

[267] *S. Ruggeri*, Transnational Investigations and Prosecution of Cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice, In: S. Ruggeri (ed.). Transnational Evidence and Multicultural Inquiries in Europe, Switzerland: Springer International Publishing, 2014, pp. 193-228.

[268]Armada, NJECL 2015 (fn. 235).

III. Principles of the European Investigation Order[269]: A conclusive threshold for fundamental (defense) rights?

As the Dir. EIO explains in its preamble (24), it establishes a single regime for obtaining evidence, but with additional rules for certain types of investigative measures such as the temporary transfer of persons held in custody (f.i. for the purpose of a hearing) and hearing by video or telephone conference. Apart from a (mostly) single regime, the Dir. EIO also endorses an applicable law regime under the *forum regit actum* rule. As such, the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state.[270] This principally means that the issuing state's law will govern the collection of evidence, but omits to clarify what*, primo*, needs to be understood under the refusal-option of an executing state based on its fundamental principles of law and, *secundo*, what law is (or should be) applicable when an issuing authority does not indicate the (additional) formalities and procedures to be followed.[271] As was indicated by the study of Vermeulen, De Bondt & Van Damme[272] this last remark is not just hypothetical, as 50 to 80% of the cases under the MLA Convention (2000) followed this scenario.

This observation notwithstanding, Directive EIO contains a number of features novel to the mutual recognition principle. Firstly, the assessment of the necessity and proportionality of an investigative measure is fully entrusted to the issuing state.[273] The executing state does, however, have recourse to a consultation procedure[274] should it consider that the conditions of its Article 6 were not met, but it ultimately remains the prerogative of the issuing state to

[269] For the scope of this article, only a selection of relevant principles are concisely dealt with. Naturally, the Dir. EIO forms a more complex array of principles. See: Ruggeri, 2014 (fn. 267); Allegrezza, 2014 (fn. 253); L. *Bachmaier-Winter*, European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive, Zeitschrift für Internationale Strafrechtsdogmatik, 9, 2014, pp. 580-589 and many others. An important point of debate – outside of the scope of this article – is on the nature of the authorities involved in EIO procedures (Armada, NJECL 2015 (fn. 235), pp.12-13) as the Dir. EIO allows – under Article 2, (c), (ii) – for the issuing state to define any competent authority for dealing with an EIO. For this article, I refer to Vermeulen (*G. Vermeulen*, Free Gathering and Movement of Evidence in Criminal Matters in the EU. Thinking beyond borders, striving for balance, in search of coherence, Antwerp/Apeldoorn/Portland: Maklu, 2011, p. 20) stating that the nature of the authorities involved should not be the decisive factor, and that the focus should be placed on the procedures by which authorities should act and the judicial remedies that need to be in place when deciding and executing investigative measures.

[270] Article 9(2) Directive EIO.

[271] Armada, NJECL 2015 (fn. 235).

[272] Vermeulen, De Bondt & Van Damme, 2010 (fn. 85), p. 22.

[273] Article 6,1. (a) Directive EIO.

[274] Article 6, 3. Directive EIO.

decide – post-consultation – on the withdrawal or continuation of the EIO. Thusly, the executing state has to refrain from assessing the proportionality and suitability of a measure itself.

Secondly, two general options provided for in the instrument allow the executing state a margin of discretion to alter or discard an issued EIO:

Primo, the executing state may have recourse to an investigative measure other than that indicated in the issued EIO, where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO. While this does not allow for the executing state to actually assess the necessity and proportionality of the demanded measure[275], it does provide some leeway to propose a less intrusive option.[276] This provision remains both optional for the executing state (the state *may* opt for a less intrusive measure available), and conditional – since the issuing state has the option to withdraw the order following its informing by the executing state of its intention to apply a less intrusive measure – but is an important derogation from the 'classical' mutual recognition instruments implying *per se* recognition and execution of a demanded form of cooperation. Take, for example, the Framework Decision regarding the mutual recognition of custodial sentences or measures involving deprivation of liberty (FD 909). [277] FD 909 applies the principle of *continued enforcement* meaning that an issued sentence needs to be recognized and executed without any adaptation, safe for when this would be manifestly irreconcilable with the national law of the executing state. With the European Investigation Order's Directive, executing states now have the opportunity to assess the investigative measure ordered – for instance: the temporary transfer of a person held in custody for the purpose of conducting a hearing[278] - and propose a valid, less intrusive alternative – for instance: rather than transferring the individual, allowing their hearing to take place via video- or telephone conference.

[275] In this regard, see the opinion of Advocate General Bot in the joint cases before the European Court of Justice of Aranyosi (C-404/15) and Caldararu (C-659/15) of 3 March 2016 (Bot, 2016 (fn. 239)) in which the Advocate General reiterates that the assessment of the proportionality and necessity of an issued European Arrest Warrant remain the firm prerogative of the issuing state.
[276] Article 10, 3. Directive EIO.
[277] Article 8.1 of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 5.12.2008.
[278] Articles 22 & 23 Directive EIO.

Secundo, the executing state ultimately retains the right to refuse an issued EIO when there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations in accordance with Article 6 TEU and the Charter.[279] When this would be the case, the executing state shall consult the issuing state and shall request the latter to supply any necessary (additional) information without delay.[280] As such, and for the first time, there is an explicit provision in a mutual recognition instrument providing a (optional) refusal ground to executing states should they be confronted with concerns regarding their fundamental rights obligations in an EIO procedure. Moreover, the instrument clearly provides for an additional information exchange (and consultation) between the executing and issuing states in such an event, (at least) implying that issuing states can no longer retain the sole motivational prerogative for demanding investigative measures.

So far, the Dir. EIO provides a triple protection feature for the person who is the subject of an EIO to rely upon:

- There is the optional consultation should proportionality and necessity issues arise, The executing state has the option to decide on a less intrusive measure should it be available and, lastly, the executing state may refuse an EIO based on fundamental rights concerns.

The optional nature of these provisions might seem to indicate, in the eyes of some scholars[281], a lax attitude vis-à-vis personal and/or defence rights concerns, but there is still the encompassing fundamental rights provision of Article 1, 4. stating that the Directive shall not have the effect of modifying the obligation to respect fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings and that any obligations incumbent on judicial authorities in this respect shall remain unaffected. As such, this provision implies that both the issuing and executing state are bound to an application of the Dir. EIO with respect to the fundamental (defence) rights,

[279] Article 11, 1. (f), Directive EIO.
[280] Article 11, 4., Directive EIO.
[281] Some authors criticised the optional and conditional nature. See: Armada, NJECL 2015 (fn. 235), p. 17.

and that the judicial authorities of these states are bound to their obligation to serve and protect these rights.

At first glance, all these provisions seem to indicate a strong commitment to the protection of fundamental (defense) rights. It remains to be seen, however, how (effectively) this principle will function in practice because of certain ambiguities that can be distinguished:

The scope and practical implications of the executing member state's voluntary right to refuse an EIO based on its fundamental right obligations under Article 11, 1., (f) seems to contradict the overall engagement under Article 1, 4. How the obligation to respect fundamental rights in the application of an EIO needs to be rhymed with an optional refusal ground based hereupon is unclear and not clarified in the instrument. Following the general obligation, for both parties instead of just the executing member state, the more specific refusal ground seems superfluous. Moreover, it has the potential of obscuring a functional fundamental rights' threshold.

It is the author's conviction, however, that both Articles interlock by creating an additional check-up before refusal: When an executing state is confronted with an ordered investigative measure seemingly contradictive to its fundamental rights obligations, it may apply Article 11 to demand additional information (and even a motivation) from the issuing state in order to ascertain itself of the legitimacy of the ordered measure. This way, any potential doubts regarding the compliance with fundamental rights obligations will not automatically give rise to refused investigation orders under Art.1, 4, but allows the interacting states to find a solution that is acceptable from a cooperative perspective as well as in terms of their fundamental rights obligations. Moreover, this interpretation supports the instrument's *less intrusive option* by allowing an alternative investigative measure to be decided between the states whilst simultaneously respecting the issuing states' prerogative to check the necessity and proportionality of the measure.[282]

Nonetheless, as indicated by Armada[283], Article 11's provision in itself remains rather obscure. It requires *substantial grounds to believe that the execution,…, would be incompatible with the*

[282] I.e.: By demanding additional information through Article 11, the executing state does not assess the proportionality and necessity of an ordered investigative measure in its consideration of the fundamental rights obligation, but allows the issuing state to (re)consider these concerns and provide additional info.
[283] Armada, NJECL 2015 (fn. 235), pp. 26-27.

state's fundamental rights obligations. Based hereupon, the executing member state needs to assess a demanded EIO's potential for future incompatibilities, which is under any circumstance highly speculative and prone to subvert mutual trust and smooth cooperation. The fact that this needs to be based on *substantial grounds* provides a threshold against frivolous assessments, but it remains to be seen how this doctrine – which is derived from the Court of Justice C-411/10 ruling on N. S. and Others[284] based on the *Soering* doctrine[285] – will unfold in the context of a hypothesis on a future potential infringement.[286] Coupled thereto, Article 11 omits any declaration regarding the burden of proof. This raises the question as to whether the executing state must investigate these substantial grounds for future infringements on its own initiative (and to what extent) and/or whether it is possible for the person(s) involved to request such an assessment. As regards to the latter, it is furthermore questionable whether the affected person can/will be aware of any EIO involving him/her. Article 16 Dir. EIO on the obligation to inform and Article 19 Dir. EIO on the confidentiality of the sought investigations do not once mention any informative duty vis-à-vis the latter. Moreover, for certain investigative measures under the scope of the Dir. EIO, this would simply be unfeasible as it would defeat the purpose of the measure (f.i. the real time gathering of evidence through controlled deliveries under Article 28 Dir. EIO).

This brief anthology indicates the potential of the combination between Article 11, 1. (f) and Article 1, 4. as the guardians of fundamental rights principles in the Dir. EIO, but remains prudent vis-à-vis its application in practice based on the discerned ambiguities. In their defence, the consultation duty and information exchange prescribed under point 4. provides an interesting modality. Rather than *rücksichtslos* terminating any cooperation, this provisions allow (mandates) the member states a moment of reflection and seeks to find a solution for a demanded EIO's potential fundamental rights infringement through dialogue and information exchange. To drive this point home, this way of cooperating in evidence clearly holds a reference to the aforementioned purpose of the Directive EIO to combine the flexibility of classic MLA features with mutual recognition principles.

With this establishment, what constitutes a member state's obligation to fundamental rights and how they should balance this obligation within a cooperation context needs answering. In

[284] European Court of Justice (2013). ECJ, 26.02.2013, C-399/11, (Stefano Melloni v. Ministerio Fiscal), [2013.]
[285] Soering v. the United Kingdom, Application No. 14038/88, Judgement 7 July 1989.
[286] Armada, NJECL 2015 (fn. 235).

this respect Article 1, 4. Dir. EIO refers to Article 6 TEU, which declares the recognition of the freedoms and principles set out in the Charter of Fundamental Rights of the European Union (CFREU), and that the fundamental rights guaranteed by the ECHR and the constitutional traditions common to the member states shall constitute general principles of the Union's law. While this seems to indicate a triple entente of ECHR, CFREU and constitutional rights protection, these operate through different standards within the AFSJ for cooperation in criminal matters. The focal point of this debate is how and whether the different protection mechanisms need to be balanced against each other and within a context of cooperation in criminal matters. In the past, it was argued that there is no common understanding within the EU on when and how fundamental rights can form an exception to MR instruments.[287]

Every member state of the EU has to be a signatory to the ECHR. The CFREU stated that, in case of corresponding rights, the meaning and scope of those rights shall be the same as those laid down by the ECHR without preventing union law to provide more extensive protection.[288]

The relationship towards national protective traditions, however, was (at least for now) decided by the ECJ in the Melloni[289] case where the Court concluded that a member state may not make use of its national (higher) fundamental rights protection to reject an issued European Arrest Warrant that meets the (lower) protection criteria by the CFREU.[290] The Court reiterated that any other assessment would impair the principles of mutual trust and recognition that the instrument aims to increase and claimed that such an interpretation would compromise the effectiveness of the instrument because it would question the uniformity of the fundamental rights protection as established by it.[291] An important aspect of the Court's reasoning for this refusal was that the EU had already established an harmonisation pathway and therefore, that allowing a higher national level of fundamental rights protection would run counter to the aim of the provision to provide a common understanding of that refusal ground (in casu concerning in absentia decisions).[292] Hence, in areas where the EU legislator as established (common minimum) definitions at EU level, the member states' margin of action will be smaller in cases

[287]Tinsley, EuCLR 2012 (fn. 232); Meysman, Pantopticon 2014 (fn. 53).
[288] Article 52, 3. Charter Fundamental Rights EU.
[289] European Court of Justice (2013). ECJ, 26.02.2013, C-399/11, (Stefano Melloni v. Ministerio Fiscal), [2013.]
[290] M. Meysman, This is Madness: Detention of Mentally Ill Offenders in Europe. The tension between cross border cooperation in the European Area of Freedom, Security and Justice and the fundamental rights of mentally ill offenders in detention, International Journal of Law and Psychiatry (IJLP), General Issue, 2017 (accepted for publication).
[291] ECJ Melloni, para. 63.
[292]Labayle, 2013 (fn. 235); van der Hulle & van der Hulle, SEW 2014 (fn. 235); Armada, NJECL 2015 (fn. 235).

where no common definitions exist and that the principle of mutual recognition will be more powerful – with more limited exception to this principle – where approximation is available. [293]

Linking back to the European Investigation Order, various such harmonisation pathways can be identified. Through various Directives, the EU has introduced common minimum rules with relevance in the field of evidence and pre-trial investigations. There is the right to interpretation and translation (European Parliament & Council, 2010), the right to information (European Parliament & Council, 2012), the right to access to a lawyer (European Parliament & Council, 2013a) and – with specific relevance for this article – the Recommendation on additional safeguards for vulnerable defendants (European Commission, 2013). With the Melloni judgment in mind, the harmonisation of these aspects of defense rights may limit the member states' margin to defend a national protective standard higher than the one provided for in the Directives, CFREU and ECHR.

Last but not least, a final observation is due for the position of the person affected in all of this. As mentioned supra, the ambiguity of certain aspects of the fundamental rights clause darken a clear and effective remedy for the individual to defend himself against a demanded investigative measure. Moreover, Armada[294] raises a very interesting point regarding the inherent focus of the Dir. EIO to serve and protect fundamental rights: The wording of both Article 11 and Article 1 refers to the execution of an investigative measure leading to a violation of the (issuing and) executing state's obligations, rather than focusing on the violation of the affected person's fundamental rights. In some respect, this is illustrative of the instrument's focus on the member states, rather than the individual involved, who could be deemed ' a mere object of criminal cooperation'. In this respect, all of the provisions above should be considered as heralds of member state cooperation without *a posteriori* liabilities based on fundamental rights infringements, rather than actual fundamental rights guardians. Notwithstanding this observation, both the ordering of an investigative measure and the transfer of foreign gathered evidence hold a severe negative potential for the person involved.

[293] Janssens, 2013 (fn. 236), p. 204.
[294] Armada, NJECL 2015 (fn. 235), p. 26.

IV. The EIO in practice: The mutual admissibility of evidence gathered in a cross-border context & the cross-border admissibility of evidence gathered in a domestic context.

When discussing the validity and admissibility of foreign evidence within the EIO-context, a distinction needs to be made between evidence gathered as a result of a demanded investigative measure in another state (evidence gathered in a cross-border context) and the transfer of evidence to the issuing state that was already obtained in the executing state (the cross-border admissibility of evidence gathered in a domestic context). This distinction is not novel to the Dir. EIO. Already under the fragmented approach (MLA, MR) this was applicable (the distinction was aptly formulated by Vermeulen[295]) the only difference being that, now, a single instrument will deal with both forms of evidence-mobility.

Under the following headings, this article will indicate the potential issues that may arise when transferring and/or hearing a mentally disordered suspect as well as the complexity of determining what constitutes an expert. Both in terms of an ordered investigative measure and as foreign evidence gathered, the lack of common standards for gathering evidence and the issues under scrutiny could bring the validity and admissibility of evidence into question and even result in fundamental rights infringements.

1. Adequately identifying vulnerability due to mental disorders: Not a sinecure.

Before any (additional) safeguard becomes relevant, it needs to be established that an individual involved in criminal proceedings is effectively in need of them due to his or her mental disorder. While the possibility of an immediate (and just) identification is not to be ruled out, EU-wide studies seem to indicate contrarious results. Various of these studies[296] indicated that qualitative screenings for mental disorders within European prisons do not take place in a consistent manner. This lack of identification of adults with a mental disorder has a potentially grave impact on the data of vulnerable defendants in cross-border criminal proceedings. Both the scarcity of information[297] on detected vulnerability due to a mental impairment combined with substandard screening methods and a general lack of identification, and the observation

[295] Vermeulen 2011 (fn. 269), p. 41-47.
[296] Blaauw, Roesch & Kerkhof, IJLP 2000 (fn. 9); Dressing & Salize, APS 2006 (fn. 9); Dressing, Salize & Gordon, EP 2007 (fn. 9); Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9); Vermeulen, Van Kalmthout, Paterson, Knapen, Verbeke & De Bondt, vol. 40 2011 (fn. 150); Vermeulen, Van Kamthout, Paterson, Knapen, Verbeke & De Bondt, vol. 41 2011 (fn. 150).
[297] Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), p. 6.

that overall, the shortage of evidence in the field of psychiatric prevalence and mental health care in prisons is nothing less than dramatic and that even the most rudimentary health reporting standards for mental health care in prisons are lacking almost everywhere in Europe[298] indicate the potential gross neglect of mentally-oriented vulnerability both in domestic and cross-border contexts.[299] Transposed to a pre-trial, investigative context and with the absence of binding international norms and standards specifically addressing screening and detection upon questioning and arrest in mind, a similar observation is applicable.[300]

Notwithstanding the absence of binding provisions regarding the detection of mentally ill suspects. There are currently norms available on an EU level[301] regarding the presence of a legal representative at the earliest possible stage in criminal procedures.[302] The specific target of this principle is the effectuation of a defendant's defence rights, and it is equally applicable to mentally disordered suspects. Moreover, this presence is quite often the first line of defence for a mentally disordered suspect by allowing the selected or appointed legal representative the opportunity the communicate their client's condition and vulnerability. In earlier contributions[303] however, we argued that the current practice of legal representation during the first hearing(s) may be insufficient to guarantee the right to effective participation in criminal proceedings and that it is doubtful whether the mere presence/assistance of a legal representative is sufficient to meet the right to a fair trial (Art. 6 ECHR) requirements for mentally disordered suspects. It is questionable - by no means pointing the finger to the legal representative as such - whether their mere presence would suffice to guarantee the adequate establishment of their client's vulnerability and protect them from making incriminating or invalid statements. Mergaerts, Van Daele & Vervaeke[304] rightfully state that the right identification of vulnerability due to mental disorder by a legal representative is all but self-

[298] Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), p. 71.
[299] M. Meysman, Quo vadis with vulnerable defendants in the EU? European Criminal Law Review (EuCLR), 2(4), 2014, pp. 179-194.
[300] Verbeke, Vermeulen, Meysman & Vander Beken, IJLP 2015 (fn. 244).
[301] Article 6 ECHR; Article 47 CFEU; European Parliament and Council Directive 2013/48/EU
[302] See also: Imbrioscia v. Switserland, Application No. 13972/88, Judgment 24 November 1993; Murray v. U.K., Application No. 18731/91, Judgment 8 February 1996; ECtHR, Salduz v. Turkey (fn.2); Panovits v. Cyprus, Application No. 4268/04, Judgment 11 December 2008, § 67; Titarenko v. Ukraine, Application No. 31720/02, Judgment 20 September 2012, § 87.
[303] Verbeke, Vermeulen, Meysman & Vander Beken, IJLP 2015 (fn. 244)); *H. Heimans, T. Vander Beken & E.A. Schipaanboord*, Eindelijk een echte nieuwe en goede wet op de internering? Deel 1: De gerechtelijke fase. Rechtskundig Weekblad, 2014-2015, 27, 2015, pp. 1043-1064.
[304] Mergaerts, Van Daele & Vervaeke, RW 2015 (fn. 242), p. 1410.

evident and, moreover, that such an identification is first and foremost not to be expected from them.

Last but not least, and in light of this contribution's focus on the European Investigation Order, there is the concrete plausibility of the cross-border element of a criminal procedure to further complicate things. Confronted with a foreign suspect, potential linguistic and cultural barriers might need to be considered, both by their legal representative and the authorities. Notwithstanding countries' own provisions on the ability to have recourse to a (sworn) interpreter and the EU's recent Directives on the right to interpretation and translation[305] and the right to information[306] in criminal proceedings, it is nevertheless conceivable that such an impeded communication might hinder the identification of a mental condition.[307] In terms of cultural barriers, and lest we forget the fact that the suspects find themselves in a foreign environment, it has been established that they tend to impair the confidence a suspect entrusts to their legal representative hindering an eventual identification[308] and enhancing the risk for different (miss-) interpretations of the suspect's statements or behaviour.[309]

The Commission Recommendation specifically aims at a presumption of vulnerability and the identification of such vulnerability in persons involved in criminal proceedings.[310] First and foremost, the Commission recommends member states to foresee a presumption of vulnerability for certain persons in their legal systems. This presumption particularly focuses on vulnerability as a result of mental disorders and to a lesser extent physical impairments.[311] Furthermore, it promotes the prompt and qualitative identification and recognition of such persons by ensuring that all competent authorities may have recourse to a medical examination by an independent expert, and that police officers, law enforcement and judicial authorities competent in criminal proceedings, should receive specific training to adequately deal with

[305] Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. OJ L/280, 26 October 2010.
[306] Directive 2012/12/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L/142, 1 June 2012.
[307] Mergaerts, Van Daele & Vervaeke, RW 2015 (fn. 242).
[308] *M.T. Boccaccini & S.L. Brodsky*, Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice. Law & Psychology Review (LPR), 25 , 2001, pp. 81-117; *S. Bryant*, The Five Habits: Building Cross-cultural Competence in Lawyers. Clinical Law Review (CLR), 33, 2001, pp. 33-107.
[309] Bryant, CLR 2001 (fn. 308).
[310] Meysman, EuCLR 2014 (fn. 299).
[311] *European Commission*, Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. OJ C 378/8, 24.12.2013. Recommendation 7.

vulnerable persons.[312] Recommendations are also made to ensure the right to medical assistance.[313]

2. Temporary transfer and consent

As aforementioned, the hearing of an expert and suspect is squarely incorporated in investigative measures that can be ordered (even in so much that the Dir. EIO proclaims that they always have to be available as an investigative measure under the law of the executing State.[314] Apart from their general inclusion, the Dir. EIO foresees specific provisions regarding the temporary transfer to the issuing state of a person in custody in the executing State for the purpose of carrying out an investigative measure[315] and the temporary transfer to the executing State of persons held in custody in the issuing state.[316] Apart from transfers, the hearing by videoconference or other audio-visual transmission of experts and suspected or accused persons is foreseen in Article 24, and ultimately the hearing of an expert (or witness) by telephone conference is foreseen under Article 25. The relevance and incorporation of these provisions is obvious, since the provided possibility for a video- or telephone conference hearing could mean a less intrusive alternative to the temporary transfer and detention of a suspect.

In Article 22, 3. (and equally, 23), with a view to temporary transfer, however, a specific reference is made to the mental condition of the person where, should this mental condition render it necessary, the opportunity to state the opinion on the temporary transfer shall be given to the legal representative of that person. This is both interesting and worrying, as one of the (optional) refusal grounds initially provided in the instrument for such a transfer is the non-consent of the person in custody.[317] A combined reading results in the conclusion that such a transfer – both to and from the issuing and executing states – may be refused when person in custody does not consent, but also that, when the states consider it necessary in view of his mental condition, this personal consent would no longer be necessary and that they shall give *the opportunity to state the opinion on the transfer* to a legal representative. Under the 'classic

[312] Recommendation (fn. 311). Recommendations 4 & 17 respectively.
[313] Recommendation (fn. 311). Recommendation 12.
[314]Article 10, 2. (c), Directive EIO.
[315] Article 22 Directive EIO.
[316] Article 23 Directive EIO, applicable like Article 22 mutatis mutandis.
[317] Article 22, 2. (a) Directive EIO.

MLA Framework' (CoE 1959 MLA Convention[318] and its additional Protocols[319], CISA 1990[320], EU MLA 2000 and its additional Protocol[321]) the temporary transfer of a person in custody was also characterised by the (optional) consent requirement[322], but without the provision now added in the Directive EIO. Moreover, these instruments specifically stated that any hearing – with the modality of video- or telephone conference included - of a (suspected or accused) person could *only* take place with the consent of the latter.[323] In the European Investigation Order's Directive, this has been reduced by stating that a hearing via videoconference - Article 24(a) - and telephone conference – Article 25(2) - may be refused if the suspected person does not consent.

As such, the EIO Directive has slyly manoeuvred the classic MLA principles within a more mutual recognition inspired bodice: The necessity of consent for a (mentally disordered) person regarding a sought transfer and (video or telephone) hearing has become an optional feature for the member states. Moreover, in the field of temporary transfers, when the latter consider it necessary in view of his mental condition, the – by now trivial – personal consent would no longer be necessary, and will be replaced by a mere opinion on the transfer from their legal representative. Apart from this attenuation of the person's *will* to be transferred, some concerns can be formulated regarding the legal representative's role in interpreting and formulating the person's statements (see infra).

3. The hearing/interrogation of mentally disordered suspects in criminal procedures: potential hazards and pitfalls.

Even when a mentally disordered suspect's vulnerability should be satisfactorily established, and notwithstanding the observations above regarding the triviality of their consent to a sought hearing, the subsequent approach remains an intricate task for the handling authorities. For

[318] Council of Europe (CoE), European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959.
[319] Additional Protocol (AP) to the European Convention on mutual assistance in criminal matters, Strasbourg, 17.III.1978 & Second Additional Protocol (SAP) to the European Convention on mutual assistance in criminal matters, Strasbourg, 8.XI.2001.
[320] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders,19 June 1990.
[321] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197/1, 12.7.2000 & Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326, 21.11.2001.
[322] See Article 11 MLA 1959, Article 3, 13 and 14 SAP MLA 1959, and Article 9 EU MLA 2000.
[323] See Article 9 SAP MLA 1959 & Article 10 EU MLA 2000.

any individual involved in criminal procedures as a suspect, the hearing/interrogation by police or judicial authorities will likely consist of an unnerving experience and – as recited by the European Court of Human Rights (see supra, ECtHR, Salduz, 2008) – render them vulnerable. As aforementioned, mentally disordered suspects[324] may find themselves in an exceptional variation hereof. Studies by Gudjonsson[325] and Herrington & Roberts[326] have shown that psychologically vulnerable defendants are - often unwillingly - prone to providing unreliable or invalid information.

The reason for this is that this specific category of defendants have difficulties with, *primo*, assessing the importance and gravity of certain questions and, *secundo*, the estimation of the subsequent implications of their answers hereto.[327] This category of defendants experience high levels of stress (higher than a "normal, rational person") on the occasion of arrest and detention in (police-) stations[328] and such emotions of anxiety enable their suggestibility.[329]

Equally, individuals with cognitive impairments were shown to be both susceptible to suggestion-techniques and negative feedback, particularly in situations where an authority figure is present.[330] In such situations (like, per definition, a police hearing during criminal investigative procedures) they are more likely to respond affirmatively, regardless of the content or implications of the question.[331] They are moreover additionally vulnerable for reasons that stem directly from their cognitive impairment and experience many difficulties with specific questions relating to space, time and place and have only a slight or no understanding of their rights and legal proceedings.[332]

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[324] For this article, the scope of this vulnerability comprises both a suspect's mental health problems (a psychiatric problematic condition) , cognitive disabilities (f.i. low IQ) and (distorted) personality traits. For a concise overview of what constitutes a 'vulnerable suspect' based on mental incapacitations, see: *K. Uzieblo*, Kwetsbare verdachten, in: N. Scholten, I Rispens, L. Smets & G. Vervaeke (eds.), Politiegids Verdachtenverhoor. Kluwer, 2014, pp. 201-220.

[325] *G.H. Gudjonsson*, The Psychology of Interrogations and Confessions. A Handbook. Chichester: John Wiley & Sons, Ltd, 2003.

[326] *V. Herrington & K. Roberts*, Addressing Psychological Vulnerability in the Police Suspect Interview, Policing, 6(2), 2012, pp. 177-186.

[327] *G. Gudjonsson*, The Psychological Vulnerabilities of Witnesses and the Risk of False Accusations and False Confessions, In: Heaton, Armstrong, Shepherd, Gudjonsson & Wolchover. Witness testimony, psychological, investigative and evidential perspectives, Oxford: Oxford University Press, 2006, pp. 61-97; G.H. Gudjonsson, Psychological vulnerabilities during police interviews. Why are they important? Legal and Criminological Psychology, 15, 2010, pp. 161-175.

[328] *J. Ogloff, L. Warren, C. Tye, F. Blaher & S. Thomas*, Psychiatric symptoms and histories among people detained in police cells, Social Psychiatry and psychiatric epidemiology (SPPE), 46(9), 2011, pp. 871-880.

[329] Gudjonsson, 2003 (fn. 325).

[330] *E. Sondenaa, K. Rasmussen, T. Palmstierna & J.A. Nottestad*, The usefulness of assessing suggestibility and compliance in prisoners with unidentified intellectual disabilities, Scandinavian Journal of psychology, 2010, pp. 434-438.

[331] *W. Finlay & E. Lyons*, Acquiescence in interviews with people who have mental retardation. Mental Retardation, 40, 2002, pp. 14-29.

[332] *M.J. O'connel, W. Garmoe & N.E. Goldstein*, Miranda comprehension in adults with mental retardation and the effects of feedback style on suggestibility, Law and Human Behaviour, 29(3), 2005, pp. 359-369.

Another important factor is their sensitivity to envision short-term interests with disregard for the long-term consequences, potentially resulting in flawed statements or confessions due to their willingness (or – compulsory – desire) to terminate the unpleasant experience that is an interrogation.[333] In the context of an interrogation, a mental condition could result in the susceptibility of a suspect to provide misleading information and even the pleading of a false confession.[334] Studies by Drizin & Leo (2004)[335] and Redlich (2004)[336] have equally identified that mental disorders may lead to distorted thought patterns, memories and cognitions and thusly may result to self-incriminating behaviour and false confessions. They are more likely to make damaging assertions, including false confessions since they may be acquiescent and suggestible and, under pressure, may try to appease other people or incriminate themselves.[337] Generally speaking, there is a typical prevalence for vulnerable defendants to have a reduced understanding of the questions asked during interrogations and an inadequate assessment of the implications of their answers and statements during such an interrogation, causing the suspect not or only partially able to provide truthful and /or informative answers.[338]

All of these studies clearly indicate the potential pitfalls of hearing a (detected) mentally ill suspect, making it the arduous task of the interrogating authority to acknowledge these indications and respond appropriately. However, Kassin (2008)[339] indicated the consequences of an inconsiderate approach, and research by Burton, Evans & Sanders (2006)[340] showed that, even when the vulnerability of an individual (suspect) was identified, the authorities involved rarely adapted their actions and approach in order to accommodate them. Linking back to the above mentioned ascertainment that – more frequently than one would like to admit – an adequate assessment and establishment of a suspect's vulnerability remains omitted, the

[333] *G.H. Gudjonsson*, Confessions, Evidence, Psychological Vulnerability and Expert Testimony. Journal of Community & Applied Social Psychology (JCASP), 3(2), 1993, pp. 117-129; *J.F. Sigurdsson, G.H. Gudjonsson, E. Einarsson & G. Gudjonsson*, Differences in personality and mental state between suspects and witnesses immediately after being interviewed by the police. Psychology, Crime and Law, 12(6), 2006, pp. 619-628; *A.D. Redlich, A. Summers & S.Hoover*, Self-reported false confessions and false guilty pleas among offenders with mental illness. Law and Human Behavior, 34(1), 2010, pp. 79-90.
[334]Kassin & Gudjonsson, APS 2004 (fn. 245); Kassin, Drizin, Grisso, Gudjonsson, Leo & Redlich, L&B 2010 (fn. 245).
[335] *S.A. Drizin & R.A. Leo*, The Problem of False Confessions in the Post-DNA world. North Carolina Law Review, 82, 2004, pp. 891-1007.
[336] *A.D. Redlich*, Mental illness, police interrogations, and the potential for false confession. Psychiatric Services, 55, 2004, pp. 19-21.
[337] Nemitz & Bean, IJLP 2001 (fn. 194).
[338] *M. Burton, R. Evans & A. Sanders*, Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies, Online report 01/06, Home Office, London, 2006. Retrieved via: http://collection.europarchive.org/tna/20080205132101/homeoffice.gov.uk/rds/pdfs06/rdsolr0106.pdf
[339] *S.M. Kassin*, False confessions, causes, consequences and implications for reform. Current Directions in Psychological Science, 17, 2008, pp. 294-254.
[340] Burton, Evans & Sanders, 2006 (fn. 338).

incapacity of law enforcement authorities to suitably respond to an identified vulnerability is all the more problematic.

To complicate matters further, two more considerations are important: Firstly, the establishment of a mental disorder in itself does not *per se* guarantee an invalid or false statement.[341] One is not necessarily causally linked to the other, but does indicate the necessity of awareness in the authorities on how to deal with mentally disordered suspects properly. Secondly, suspects may manipulate or even feign/simulate mental conditions with a view to sentence commutation or to achieve a different pre-trial regime.[342] Both these considerations potentially exacerbate the already complex practice of hearing mentally disordered suspects.

The ascertainment of the under-detection of mental vulnerability and the inherently complex but also problematic approach of law enforcement authorities vis-à-vis the hearing of them hang as a looming sword of Damocles above the defense rights of mentally disordered suspects. A recent Fair Trials International survey (2012)[343] of over one hundred defence lawyers from across the EU, confirms this, by showing that in many member states, there are inadequate safeguards in place to ensure that suspects with mental conditions or another kind of vulnerability are able to understand the proceedings in which they are involved and are treated fairly. Apart from the personal repercussions, they have the potential of seriously undermining the legality and validity of the evidence itself. Moreover, the scarcity of information on detected vulnerability due to a mental impairment combined with substandard screening methods and a general lack of identification imply, at least, the possibility of a much higher number of mentally vulnerable persons involved in cross-border proceedings that slip through the net.[344]

The Commission Recommendation, relating to this aspect, recommends on the mandatory nature of audio-visual recordings of questionings of mentally vulnerable suspects.[345] This suggestion seems a welcome addition/correction to the Dir. EIO's voluntary approach hereto.

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[341] Gudjonsson, JCASP 1993 (fn. 333).

[342] *J.F. Edens, N.G. Poythres & M. Watkins-Clay*, Detection of Malingering in Psychiatric Unit and General Population Prison Inmates: A comparison of the PAI, SIMS and SIRS. Journal of Personality Assessment, 88(1), 2007, pp. 33-42; *P. Giger, T. Merten, H. Merckelbach & M. Oswald*, Detection of Feigned Crime Related Amnesia: A Multi-method Approach. Journal of Forensic Psychological Practice, 10(5), 2010, pp. 440-463*; K. Van Oorsouw & H. Merckelbach*, Detecting Malingered Memory Problems in the Civil and Criminal Arena. Legal and Criminological Psychology, 15(1), 2010, pp. 97-114.

[343] *Fair Trials International*, Defence rights in the EU. Appendix 2. London: Fair Trials International, 2012. Retrieved via: http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf

[344] Meysman, EuCLR 2014 (fn. 299).

[345] Recommendation (fn. 311). Recommendation 13.

Furthermore, the Recommendation promotes the presence and assistance of a(n) (appointed) legal representative or appropriate adult during police station and court hearings.[346] The presence of an appropriate adult (which seems mimicked from the England & Welsh system) in addition to a lawyer during hearings might help to clear out some of the cultural, linguistic and personal barriers in the communication between the lawyer and the mentally disordered person as identified above.

4. The expert conundrum: EU wide diversity regarding forensic psychiatric expertise.

With the *supra* establishment of the complex and uncertain task of identifying vulnerability due to a mental disorder and the arduous role of legal representatives and police officers herein, one may resort to scientific expertise. Indeed, apart from demanding a hearing or obtaining a report from a previously conducted hearing, the EIO may also be used to demand an expert evaluation in a cross-border context (see infra). At first glance the presence of a scientific expert during hearings/interrogations and assessments of the mentally disordered suspect by such an expert have the potential to conclusively settle this debate. In terms of mental conditions, this would mean an appeal to forensic psychiatric expertise. However, various studies[347] have indicated that EU-wide diversity exists, both in terms of qualitative and quantitative aspects, regarding forensic psychiatry. Examples include the non-recognition of forensic psychiatry as a sub-specialty of psychiatry[348] and the significant variation regarding the assessment and reassessment of mentally disordered offenders and professional training standards across European member states.[349] While the more recent studies cautiously conclude that apparent progress towards developing high standards in training in psychiatry has been made, differences between the training centres in different countries still remain.[350]

The admissibility and value of evidence is, especially with respect to non-exact sciences like (forensic) psychiatry, highly dependent on the methods used to conduct the expertise and

[346] Recommendation (fn. 311). Recommendation 10.
[347] *J. Gunn & N. Nedopil*, European training in forensic psychiatry, Criminal Behaviour and Mental Health (CBMH), 15(4), 2005, pp. 207-213; *H.Gordon & P. Lindqvist,* Forensic psychiatry in Europe. Psychiatric Bulletin (PB), 31(11), 2007, pp. 421-424; *W. Lotz-Rambaldi, I. Schäfer, R. ten Doesschate, F. Hohagen*, Specialist training in psychiatry in Europe – results of the UEMS-survey, Eur Psychiatry (EP), 23(3), 2008, pp.157-168; *J. Gunn & P. Taylor*, Forensic Psychiatry: Clinical, Legal and Ethical Issues, Second Edition. CRC Press, 2014.
[348]Gunn & Nedopil, CBMH 2005 (fn. 347).
[349] Dressing & Salize, APS 2006 (fn. 9).
[350]Lotz-Rambaldi, Schäfer, ten Doesschate, Hohagen, EP 2008 (fn. 347)*;* Gunn & Taylor, 2014 (fn. 347).

report on it[351], and the qualifications of the scientific expert. Regarding this last part, and as cited by Vermeulen[352], Walsh argued that the problems with (assessing) expert evidence are not so much related to interpreting what the expert brings to court, but are related to deciding who can be an expert to bring anything to court in the first place.[353] As such, the indicated European diversity darkens the optimism of how forensic psychiatric expertise might provide a solution for mentally disordered suspects, and obscures the validity and free movement of such scientific expert evidence.

V. Conclusion

The analysis of the European Investigation Order and the practice of dealing with mentally disordered suspects in a context where no common standards for gathering evidence in cross-border cases exists, has shown both the potential and the hazards of the new instrument. With the inclusion of consultation rounds on an ordered investigative measure's proportionality, the optional feature of conducting a less intrusive measure and finally the determination of an explicit fundamental rights threshold in the instrument, the overarching impression is a positive one. However, the inherent complexity – both for the member states and the affected person – of some of these features makes an assessment of their effective protection difficult in terms of future deployment. Furthermore, the Directive EIO has slyly manoeuvred classic MLA features into a strict mutual recognition bodice by diminishing the relevance of a suspected person's consent with transfers and hearings. With particular relevance for mentally disordered suspects, the instrument has even included a provision that eliminates their consent altogether in favour of an opinion by a legal representative. Apart from this, the research showed the various pitfalls during an investigative stage that may originate from the mental condition of the person involved. From a personal focus point, the condition of a mentally disordered suspect does not only render him vulnerable to infringements regarding defence rights (effectively participating in hearings, retaining the right not to incriminate himself through false or invalid confessions, etc.) and fair trial rights (with evidence gathered in accordance to legality, proportionality and necessity principles, but also with respect for the mental condition resulting in additional safeguards), but also makes it more difficult to access the protection

[351] De Bondt & Vermeulen, 2011 (fn. 252).
[352] De Bondt & Vermeulen, 2011 (fn. 252), p. 75.
[353] *J.T. Walsh*, The evolving standards of admissibility of scientific evidence, The Judges' Journal, 1997, p. 33.

mechanisms offered. From a member state perspective, there is the risk of a confrontation with evidence gathered with disregard of (national) admissibility standards, both in terms of ordering an investigative measure or transferring foreign gathered evidence. The harmonisation of criminal law through the Roadmap's Directives and the Commission Recommendation provides a welcome but incomplete addition. So far, only the Recommendation promotes safeguards specifically targeting mentally disordered suspects. While these safeguards on their own are susceptible for improvement, some of them could effectively benefit the position of mentally disordered suspects within European Investigation Order procedures. The suggestive nature of the instrument, however, obscures any foreseeable improvement. As such, the proper functioning of the European Investigation Order will depend on whether (and how far) the member states are willing to apply some of its nifty features.

Chapter V. Criminal Accountability & differing member state traditions

I. Introduction

European legal systems accept that individuals cannot be held (fully) accountable for acts committed when a mental disorder has impaired their free will, which in turn diminishes the right or duty to take punitive sanctions.[354] From a legal perspective, some categories of mentally disordered defendants and offenders[355] are therefore - compared to individuals whose mental abilities are not affected- treated differently throughout criminal proceedings. Based on their accountability doctrines, most legal frameworks throughout the European Union (EU) are characterised by the incorporation of the concept of (degrees of) criminal responsibility. However, this concept is not applied in all member states and is, furthermore, prone to Member State-specific diversity.[356] Countries with an Anglo-Saxon or Common Law tradition, or those that adopt significant features thereof, often exclude an assessment of mentally disordered suspects' criminal responsibility from pre-trial or trial procedures. In these member states, the mental disorder and - consequently - the individual's medical needs, as well as the risk posed as a result thereof, are the decisive criteria for righteous disposal, regardless of a causal connection between mental status and offence in terms of accountability.

The (non) use of (degrees of) criminal responsibility affects the legal status of the individual. Only individuals who are found guilty of a criminal offence have a criminal record, which can be cited as an aggravating factor in subsequent criminal proceedings and could therefore have an effect on sentencing for a subsequent offence. A second important consequence concerns the way by which subsequent disposal options are affected by the (non-) use of (degrees of) criminal responsibility. It is a principle of law[357] that criminally unaccountable offenders should

[354] Salize & Dressing, 2005 (fn.1), p. 15; Ashworth, 2006 (fn. 1); J. Blomsma & D. Roef, 2015 (fn.1), p. 166.

[355] The focus is on individuals for whom the *actus reus*, the objective element of a crime i.e. the commitment of an act constituting a (legal) criminal offense, has been established but who's *mens rea*, i.e. the mental fault element, is affected by a mental disorder. Therefore, the terms defendant and offender are to be considered in this perspective.

[356] Salize & Dressing, 2005 (fn. 1), pp. 41-42.

[357] For the Member States under investigation, this principle is mirrored in the Netherlands' Articles 37 and 37a of the Dutch Criminal Code and Section 37 of the England & Wales' Mental Health Act 1983. As for Belgium, Article 71 of the Belgian Criminal Code does not foresee an explicit reference. This was seemingly settled in section IV of the 1964 law for the protection of society, but it still allows for mentally ill offenders to be placed in psychiatric annexes to ordinary prisons. In Article 2 of the new (and future) law of 2014, the subjective right to adequate care is introduced, but the new legislation still allows for (temporary) placement in psychiatric annexes (Article 11).

not be placed in ordinary prison settings and should be diverted to an appropriate institution where they receive appropriate care and treatment.[358] However, when a Member State applies a sliding scale for assigning criminal responsibility or does not use the concept at all, the situation becomes more complicated.

By assessing the situation in the Netherlands, Belgium and England & Wales, this chapter entails a concise comparison of the differences between the three main legal options for dealing with the mental status of defendants in terms of accountability. Secondly, an analysis of three cooperation instruments is conducted: The Council Framework Decision on taking account of previous foreign convictions, the Framework Decisions on the European Criminal Record Information System and finally the Framework Decisions dealing with the recognition and execution of foreign judgments. Starting from the established diversity, the potential and factual merits and obstacles of these instruments are identified. The reason for the selected member states is that these countries represent the principal approaches in the EU vis-à-vis mentally disordered defendants: A dichotomous accountability system epitomized by Belgium, a graded approach in the Netherlands and the aforementioned doctrine of diversion personified by England & Wales.

[358] This right to adequate care in an appropriate institution is linked to the so-called principle of normalization (or equivalence of care) which prescribes that correctional health services are obliged to provide persons deprived of liberty with the care of a quality equivalent to that provided for the general public in the same country. See: article 12 of the United Nations' (UN) International Covenant on Economic, Social and Cultural Rights; Council of Europe: article 40 of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (the European Prison Rules); articles 10, 11, 12, 19 and 52 of the Recommendation R(98)7 concerning the Ethical and Organisational Aspects of Health Care in Prison; article 35 of the Recommendation R(2004)10 concerning the Protection of the Human Rights and Dignity of persons with Mental Disorders; CPT standards - Health care services in prisons, 31 and 38 and CPT standards - Involuntary placement in psychiatric establishments, 32; United Nations: article 22 of the Standard Minimum Rules for the Treatment of Prisoners; article 1 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; articles 1 and 20 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

II. The Belgian, Dutch and English & Welsh approach

Under Belgian law, a dichotomous system is applied regarding the (criminal) responsibility of mentally disordered offenders. This has been the pinnacle since 1930[359] and remained virtually untouched in the legislative Calvary that Belgium's legislation vis-à-vis mentally disordered defendants turned out to be: The 1930 law was changed by its 1964 follow up[360] and altered in 1983 due to a decision by Belgium's highest Court of Cassation.[361] With the 2007 law an attempt was made to replace[362] the by now archaic 1930/1964 provisions, but its entry into force was postponed multiple times and ultimately adjourned until the 1st of January 2015. By this time, the Belgian approach had mustered up an imposing amount of criticism[363], not in the least from the European Court of Human Rights (ECtHR) resulting in 22 convictions for breaches of the fundamental principles and safeguards enshrined in the European Convention of Human Rights, 20 of which stem from the last two years alone.[364]

Come the 1st of January 2016[365], the new law concerning internment[366] will replace all of the above and anchor certain principles deriving from case-law – like the requirement that the defendant still constitutes a hazard for society at the time of the verdict[367] – and the already existing legal practice – according to which no internment measure can be imposed without a

[359] See Articles 1 and 10 of the 'Wet van 9 april 1930 tot bescherming van de maatschappij tegen abnormalen en de gewoontemisdadigers'.
[360] Wet van 1 juli 1964 tot bescherming van de maatschappij tegen abnormalen en de gewoontemisdadigers (B.S. 17 juli 1964)
[361] Cass. 11 januari 1983, R.W., 1982-83, 2114.
[362] While the 2007 attempt did foresee some radical changes from the 1930/1964 legislation, it left the dichotomous responsibility approach largely unchanged. See: Articles 8 and 13 of 'Wet van 21 april 2007 betreffende de internering van personen met een geestesstoornis'.
[363] For a concise overview of Belgium's arduous legislative route and the principal formulated criticisms, see: *J. Casselman*, Dertig jaar forensische gezondheidszorg in Vlaanderen. Over een trein die stilstond en recent in beweging kwam, in: Bruggeman, W. a.o. (eds.), Van pionier naar onmisbaar. Over 30 jaar Panopticon Antwerpen/Apeldoorn: Maklu, 2009, pp. 334-355; Heimans, Vander Beken & Schipaanboord, RW 2015 (fn. 303)*;* Verbeke, Vermeulen, Meysman & Vander Beken, IJLP 2015 (fn. 244).
[364] With the definitive ruling by the ECtHR in the case of L.B. v. Belgium on the 2nd of January 2013 as the starting point: L.B. c. Belgique, Application No. 22831/08, Judgement 02 January 2013 (22831/08). The two remaining previous convictions are the 1998 case of Aerts v. Belgium and the 2011 case of De Donder & De Clippel v. Belgium: Aerts v. Belgium, Application No. 25357/94, Judgement 30 July 1998; De Donder and De Clippel v. Belgium, Application No. 8595/06, Judgement 06 December 2011. See: Meysman, IJLP 2017 (fn. 290).
[365] Although it remains to be seen whether it will effectively enter into force in full on this set date, given some of the concerns authors have formulated regarding necessary reparations, see: *H. Heimans & T. Vander Beken*, De nieuwe interneringswet van 5 mei 2015, in: J. Casselman, R. De Rycke & H. Heimans (eds.). Internering: nieuwe interneringswet en organisatie van de zorg, Brugge: Die Keure, 2015, pp. 49-110.
[366] Wet van 5 mei 2014 betreffende de interning van personen (B.S. 9 juli 2014).
[367] Articles 9-15 Wet van mei 2014. See: Heimans & Vander Beken, 2015 (fn. 365), p. 63.

forensic psychiatric evaluation[368] –, but will not alter the dichotomous approach: it foresees an expanded role for the psychiatric evaluation, and extra safeguards regarding the quality hereof[369], but leaves the general doctrine untouched. Yet, apart from the criticism regarding the procedural position and unlawful detention of internees, this approach has been denounced[370] for not taking account of the psychiatric reality which is rarely – if ever – black and white.

The uncertainty on which grounds the notion of free will and psychiatric disorders should be given specific content in legal practice remains largely intact, because quantification of the capacity to resist carrying out an act or to appreciate its wrongfulness is not at present possible by any psychometrically established method.[371] The situation remains black or white with the offender deemed either fully criminally responsible and therefore eligible for a criminal penalty, or with the latter considered fully irresponsible as a result of mental illness, resulting in an internment measure. Such an internment measure is not aimed at retribution/penalisation, but serves the double purpose of protecting society as well as the offender suffering from mental illness.[372] As such, the internment of mentally ill offenders as a measure is still fully separated and distinguished from criminal sanctions[373], and no legal provisions regarding a potentially graded criminal responsibility exist. Because of this dichotomous approach, a combination of a

[368] Article 5 of the Wet van 5 mei 2014 betreffende de internering van personen. While the perished 2007 law foresaw a similar mandatory psychiatric evaluation, the current legislation still does not provide a mandatory prior forensic evaluation. See: Heimans, Vander Beken & Schipaanboord, RW 2015 (fn. 303), p. 1053.

[369] Article 5 of the Wet van 5 mei 2014 betreffende de internering van personen foresees an expanded role and purpose of the forensic psychiatric evaluation, the augmentation of the advice to be provided (in terms of the requirements for internment) by the appointed expert(s) and the creation of a department within the Federal Health Administration occupied with the monitoring of the quality standards of the expertise provided.

[370] *J. Goethals*, De wet tot bescherming van de maatschappij in een historisch perspectief, in: J. Casselman, P. Cosyns, J. Goethals, M. Vandenbroucke, M. De Doncker & C. Dillen (Eds.), Internering. Leuven/Apeldoorn: Garant, 1997, pp. 11-38*; S. Vandevelde, V. Soyez, T. Vander Beken, S. De Smet, A. Boers & E. Broekaert*, Mentally ill offenders in prison: The Belgian case. International Journal of Law and Psychiatry, 34 (1), 2011, pp. 71-78.

[371] *J.R. Waldbauer & M.S. Gazzaniga*, The divergence of neuroscience and law, Jurimetrics, 41, 2001, pp. 357–364; *E. Hollander, B.R. Baker, J. Kahn & D.J. Stein*, Conceptualizing and assessing impulse-control disorders, in: E. Hollander & D.J. Stein (eds.) Clinical manual of impulse-control disorders. Arlington. American Psychiatric Publishing, 2006, pp. 1-15; *C. Slobogin*, Minding justice: Laws that deprive people with mental disability of life and liberty. Cambridge: Harvard University Press, 46, 2006; *P. Sasso*, Criminal responsibility in the age of mind-reading, American Criminal Law Review, 46, 2009, pp. 1191–1244; *S. Henderson*, The neglect of volition, British Journal of Psychiatry, 186, 2005, pp. 273-274.

[372] According to the law's Article 11, the execution of an internment decision has not changed dramatically either as internees can still (temporary) be sent to psychiatric annexes in prisons. With this being the main cause for confirmed breaches of the ECHR's Article 5 (lawful detention) and even Article 4 (prohibition of torture and inhuman or degrading treatment) in the ECtHR's judgements regarding Belgium, it can be considered as a missed opportunity for the new legislation to put an end to the defective practice of placing internees in prison settings.

[373] See Article 9 of the Wet van 5 mei 2014 betreffende de internering van personen.

prison sentence and an 'internment' order (which is – conceptually – comparable to a hospital or TBS order in the Netherlands, see infra) remains a judicial impossibility.[374]

Like in Belgium, the Dutch Criminal Code exculpates a mentally ill offender.[375] When there is reasonable suspicion that an offence was committed by a mentally disordered offender and there is reason to believe that the mental status is causally related to the act(s) committed, an expert assessment of this individual will take place.[376] When the imposition of a *Terbeschikkingstelling*-measure (TBS) or a hospital order is considered, this assessment is mandatory.[377] When such an order is decreed, treatment in a secured forensic or hospital setting will be the main post-trial focus.[378] There are two versions of this TBS: TBS with mandatory hospital care (imposed predominantly for violent offences)[379] and TBS with conditions attached.[380] Most hospitalized TBS patients can therefore be found in maximum security hospitals within the justice system, whereas the conditional TBS can be imposed for offences which do not directly concern the physical safety of other persons, in which cases the risk of criminal recidivism is considered to be such that mandatory hospitalisation is not necessary. In order to provide profound and precise advice to the prosecution and the court on whether or not to impose a TBS or hospital order, experts will have to explore the mental state of the offender. Expert reports have to demonstrate whether or not the defendant is suffering from a mental disorder and whether or not there is a causal connection between the defendant's mental state and the act(s) committed. In addition, experts have to give advice on

[374] *S. Snacken*, Penal Policy and Practice in Belgium. Crime and Justice, 36(1), in Crime, Punishment, and Politics in a Comparative Perspective, 2007, pp. 127-215.
[375] Article 39 of the Dutch Criminal Code (DCC).
[376] See: *C. Kelk*, Studieboek materieel strafrecht, Deventer: Kluwer, 2005, pp. 252-253; *CH. J. Enschedé*, Beginselen van strafrecht, Deventer: Kluwer, 2002, p. 159; *J. De Hullu*, Materieel strafrecht. Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht, Deventer: Kluwer, 2003, p. 342; *D.H. De Jong & G. Knigge*, Het materiële strafrecht, Deventer: Kluwer, 2003, p. 148; *M.J. Kronenberg & B. De Wilde*, Grondtrekken van het Nederlandse strafrecht, Deventer: Kluwer, 2007, pp. 84-85.
[377] This involves a multidisciplinary assessment by a psychologist and psychiatrist. It is also possible that the offender will have to remain in an institution for permanent observation by a multidisciplinary team, see: Article 37 DCC.
[378] Articles 37 and 37a DCC.
[379] TBS with mandatory hospitalisation is in principle unlimited in duration. However, as soon as the risk of criminal recidivism has diminished to a level considered to be acceptable, the TBS measure must be terminated, see Article 37b DCC.
[380] Article 38 DCC. The legal position of TBS-patients, such as rules for care and treatment, is further elaborated in the Principles Act TBS (Beginselenwet Verpleging Terbeschikkinggestelden, BVT) and the TBS regulations (Reglement Verpleging Terbeschikkinggestelden, RVT), available via: http://www.wetten.overheid.nl/BWBR0008765/geldigheidsdatum_02-09-2015 and http://wetten.overheid.nl/BWBR0008690/geldigheidsdatum_02-09-2015.

the presence of the risk that the offender will relapse to offending (recidivism) and, if so, what the best post-trial options entail to reduce that risk for recidivism.[381]

The Dutch penal approach seems thus far fairly similar to the Belgian. However, the Dutch penal system allows for a dimensional approach in order to determine the criminal responsibility of the offender and the subsequent sentencing. When determining the causal connection between the latter's mental state and the act(s) committed, the experts, in their advisory role to the prosecution and the court, use a graded scale[382] which consists of the following gradations: full responsibility, slightly diminished responsibility, diminished responsibility, greatly diminished responsibility and criminally irresponsibility.[383] Based on this – non-binding – advice, the court then autonomously decides and determines the applicable sentence, with the possibility to impose combined sentences based on the offender's diminished responsibility. When the offender is deemed to be fully responsible a prison sentence or another penalty can be imposed. In all other instances, and depending on the (severity of the) offence and the risk to society[384], the court can impose a TBS or hospital order.[385] Such a TBS order can furthermore be accompanied by an additional prison sentence.[386] Only when an individual is deemed to be not fully criminally irresponsible[387], such a TBS or hospital order potentially imposed will not be mentioned on the offender's criminal register. As such, and opposite the Belgian dichotomous doctrine, the Netherlands allow for a more nuanced assessment – both for the consulted experts and the courts – of the offender's criminal accountability, and subsequently a more diversified sentencing-approach in terms of (combinations of) measures and/or penalties.

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[381] See *T. Kooijmans & N. Jörg*, Het juridisch kader van de gedragsdeskundige rapportage, in: H.J.C. Van Marle, P.A.M. Mevis & M.J.F. Van Der Wolf (eds.). Gedragskundige rapportage in het strafrecht, Deventer: Kluwer. 2008, pp. 187-188; *G. Groenhuijsen & T. Kooijmans*, Rapporteren ten behoeve van de strafrechter: de psyche geanalyseerd, in: M. Groenhuijsen, S. Kierkels & T. Kooijmans (eds.). De forensische psychiatrie geanalyseerd: Liber amicorum Karel Oei. Antwerpen: Maklu, 2011, pp. 60-61.

[382] *M. Spaans, M. Barendregt, B. Haan, H. Nijman & E. de Beurs*, Diagnosis of antisocial personality disorder and criminal responsibility, International Journal of Law and Psychiatry (IJLP), 34, 2011,p. 375.

[383] There are authors who state that the Dutch categories of slightly diminished and diminished responsibility run parallel with the Belgian concept of full criminal responsibility, while the category of greatly diminished responsibility implies no criminal responsibility in Belgium, See: *P. Cosyns*, De forensische geestelijke gezondheidszorg in Vlaanderen op een keerpunt: het licht schijnt in de duisternis?, in: W. Bruggeman, E. De Wree, J. Goethals et al. (eds.). *Van pionier naar onmisbaar. Over 30 jaar Panopticon*. Antwerpen/Apeldoorn: Maklu, 2009, p. 388. While this kind of comparative assessment may be defended from a theoretical point of view, it remains the practical reality that the Belgian doctrine does not foresee, nor allow, a graded responsibility and subsequent combined sentence.

[384] The hospital order can also be imposed if the person concerned is 'only' a danger to him or herself.

[385] This, however, is not an obligation. With its discretionary competence, the court may also decide to impose a penalty without a combined TBS or hospital order in cases of diminished criminal responsibility, see: *C.P.M. Cleiren & J.F. Nijboer,* Strafrecht: tekst en commentaar, Deventer:Kluwer, 2010, p. 255.

[386] *F.AM. Bakker & L.C.P. Goossens*, Lange gevangenisstraf en tbs: combineren of kiezen?, Trema, 2000, pp. 42-43.

[387] Under the aforementioned Article 39 DCC.

The English & Welsh legal system - more than any other European jurisdiction - emphasises the importance of what is generally referred to as 'diversion'.[388] The process of diversion implies that on various times on the offender pathway - before arrest, after proceedings have been initiated, in place of prosecution, or when a case is being considered by the courts - an assessment is made by dedicated services as regards the righteous disposal of a specific case in terms of prosecution, remand, sentencing and resettlement. Because diversion may occur at any stage of the criminal justice process, diversion schemes - which are run by medical staff[389] - can be found in police stations, remand prisons and courts.[390] Diversion aims at diverting mentally disordered offenders away from the criminal justice system, to the health and social care sectors, using either the forensic provisions of the Mental Health Act 1983 (amended in 2007) or the civil provisions when the offences are of a less serious nature.[391]

Diversion implies that offenders will not be punished but will receive treatment instead, because this is seen as the best option in terms of clinical outcome as well as societal protection. Information on a defendant/offender's mental health status is crucial since a custodial sentence does not always have to be the default position. Where used appropriately, community sentences can provide safe and positive opportunities for offenders with mental health problems or learning disabilities to progress with their lives, as well as receiving a proportionate sanction from the court.[392] In more severe cases of mental disorders - generally concerning psychotic disorders[393] - courts can also decide to divert the offender out of the criminal justice system by imposing a hospital (and restriction) order. Conceptually, these orders cannot be perceived as a form of punishment and questions of retribution or deterrence are therefore immaterial.[394] The sole purpose of these orders is to ensure that the offender receives the medical care and attention which (s)he needs in the hope and expectation that the

[388] *D.V. James'* contribution in: Salize & Dressing, 2005 (fn.1), pp. 122-133; Bradley, 2009 (fn. 197).
[389] Diversion schemes vary in their composition. Court diversion schemes *for example* range from single community forensic nurses (CPNs) visiting court, to multidisciplinary teams with administration staff, computerisation and a permanent base in the court building, see: *D.V. James et al*., Outcome of psychiatric admission through the courts, RDS Occasional paper No 79, Home Office, 2002.
[390] James et al., 2002 (fn. 389); *J. Coid &, S. Ullrich*, Prisoners with psychosis in England & Wales: Diversion to psychiatric services? International Journal of Law and Psychiatry,99, 2001; Bradley, 2009 (fn. 197).
[391]James, IJLP 2010 (fn. 198), p. 241.
[392]Bradley, 2009 (fn. 197), p. 12.
[393] Under the 1997 Act, a hospital direction could only be made for offenders categorised as psychopathically disordered. Under the 2007 Act, there is no sub categorisation of mental disorder, and a hospital direction is available in respect of any offender who receives a prison sentence, except where the sentence is fixed by law. Mental health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders (2008). Ministry of Justice. 17-18.
[394] Mental health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders (2008). Ministry of Justice. 2, 9 and 12.

result will imply the omission of further criminal acts.[395] A major difference as regards the aforementioned continental jurisdictions however is that the criteria for hospital disposal can be seen as almost wholly medical in nature, so that legal concepts of criminal responsibility are irrelevant in the disposal of mentally disordered offenders by the courts.[396] As such, for England and Wales, the efficient disposal of the defendant is considered much more important than labels concerning the criminal responsibility of the offender, the latter not being guilty by reason of insanity or acquittal, and the system allows the transfer of people from a prison context to a mental hospital regardless of the outcome of a potential insanity defence.[397] The Ministry of Justice's (MOJ) Guidance for Courts circular of 2008[398] furthermore explains that the court's discretion to divert an offender for hospital treatment is not limited nor determined by the question of criminal responsibility. The court only needs to be of the opinion that the hospital order is the most suitable method of disposing the case.[399]

Diversion may therefore have the effect of the individual passing out of the penal system and into a hospital regime where only the treating psychiatrist and hospital managers can grant the decision for leave or can discharge the patient from the hospital.[400] Such determination will be based upon the evolution of the offender's medical conditions and the risk arising from it.[401] When a person has been convicted of a serious offence, however, the sentencing judge in a Crown court has the power to add a so-called *restriction order* to a hospital order.[402] This

[395] "Once the offender is admitted to hospital pursuant to a hospital order... without restriction on discharge, his position is exactly the same as if he were a civil patient. In effect he passes out of the penal system and into the hospital regime. Neither the court nor the Secretary of State has any say in his disposal..... A hospital order is not a punishment…. Questions of retribution or deterrence are immaterial. The sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation that the result will be to avoid the commission by the offender of further criminal acts" R. v. Birch, 1989: 11 Cr. App. R.(S.) 202, 210.

[396] In England & Wales and Ireland, the criminal responsibility of a suspect is considered only in cases of homicide, where the charge will be reduced to one of manslaughter, if the defendant's responsibility can be shown to have been diminished, see: James, 2005 (fn. 391).

[397] *J. Blomsma*, Mens Rea and defences in European Criminal Law. School of Human Rights Series, 54, Cambridge UK: Intersentia, 2012, p. 485.

[398] The sequence of the courts' structured approach as regards the decision making process in cases involving mentally disordered offenders was first described in the case of R. v Birch. According to the MOJ guidance this case remains an apt description of the courts' options, see: Mental health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders (2008). Ministry of Justice. 16-17.

[399] Mental health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders (2008). Ministry of Justice. 9 & 16.

[400] Mental health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders (2008). Ministry of Justice. 12.

[401] The patient may only be detained for six months, unless the order is renewed by the treating psychiatrist, under conditions resembling those which were satisfied when he was admitted. After detention for six months, the patient may appeal to an independent Mental Health Review Tribunal, constituted under Part V of the 1983 Mental Health Act, which has the power to discharge from hospital against the advice of the supervising psychiatrist. James, IJLP 2010 (fn. 198), p. 242.

[402] Section 41 of the Mental Health Act, see: James, IJLP 2010 (fn. 198), p. 242; James, 2005 (fn. 391), p. 123.

restriction order has the effect that it removes the competence to release the patient from hospital from the treating psychiatrist. Release is then determined by the Justice Ministry, or by an independent Mental Health Review Tribunal. In order for the court to impose a restriction order, it must be the judgement of the court that the imposition of the order is necessary "for the protection of the public from serious harm", this being "having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large". This is therefore a provision based primarily upon considerations of public safety and does not reflect a clinical decision. In addition, a restriction order is conceptually not related to the idea of punishment or deterrence, since it is determined principally by medical outcome and related issues of risk. The patient's management however will still be determined by clinical assessment of his mental disorder and the risks arising from it, but the Secretary of State for Justice becomes responsible for the risk assessment informing decisions to grant greater liberty and, consequently, for taking those decisions.[403] Referring back to the objective of this article, England & Wales differ from the continental practice in that legal concepts of criminal responsibility for adults are irrelevant in the disposal of mentally disordered offenders by the courts (other than in case of homicide) and that it is rejected as a determining factor for deciding to impose a hospital order.[404]

The analysis of the three Member States' legal systems clearly identifies diversity in their approach regarding mentally ill defendants. Both the interpretation and application (and, in the case of England and Wales, even relevance) of the concept of criminal accountability and the subsequent decisions regarding the appropriate response in terms of sanctions and/or measures differ to considerable extent. Moreover, the way in which countries approach the subject of criminal accountability and address societal and individual protection, (penal) retribution and/or socio-medical considerations, constitutes a substantial part of their criminal systems as sovereign states. This however prompts the question on how these different criminal systems could (and should) cooperate when this would be necessary or desirable within the Area of Freedom, Security and Justice. Before this inquiry can be made, it needs to be established whether it is feasible to deal with mentally disordered offenders on an EU level.

[403] Mental health Act 2007: Guidance for the courts on remand and sentencing powers for mentally disordered offenders (2008). Ministry of Justice. 13.
[404] James, IJLP 2010 (fn. 198), p. 242.

Ideally, this feasibility should find its affirmation both from a competency perspective and a practical demand.

III. Sharing criminal records information and taking account of previous foreign convictions in the EU.

The practice of communicating information on criminal convictions and exchanging criminal records information between countries is not a new concept. Already in 1959, the Council of Europe Convention on mutual assistance in criminal matters[405] (MLA Convention) provided for the exchange of information from judicial records, criminal convictions and the subsequent measures between contracting parties.[406] The main aim of the establishment of a criminal record is to inform the authorities responsible for the criminal justice system on the background of a person subject to legal proceedings with a view to adapting the decision to be taken to the individual situation.[407]

On EU level, and in line with the conclusions of the Tampere European Council 1999, the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters included in measure (3) the establishment of a standard form for criminal record requests.[408] The 2000 Convention on mutual legal assistance (MLA Convention)[409] included in its Articles 6 and 7 provisions on the spontaneous exchange of information relating to criminal offences and the infringements of rules of law. The 2004 Hague Programme recognised officially that the exchange of information among law enforcement authorities should be governed by the principle of availability and called for a greater exchange of information from national conviction and disqualification databases. The Action Plan of the Council and the Commission to develop the Hague Programme also mentioned the need to improve information exchanges about criminal convictions. In January 2005, the Commission

[405] Council of Europe (1959). European Convention on Mutual Assistance in Criminal Matters. Strasbourg, 20.05.1959. Retrieved via: http://conventions.coe.int/Treaty/EN/Treaties/Html/030.htm.
[406] Chapter VII, Article 22 of the MLA Convention.
[407] Council of Europe Recommendation No R (84) 10 on criminal records and rehabilitation of convicted persons, 1984. Retrieved via: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=603787&SecMode=1&DocId=682808&Usage=2.
[408] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 012 , 15.01.2001.
Retrieved via: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001Y0115%2802%29&from=EN
[409] Council act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, available via: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF

presented its White paper on exchanges of information on convictions and the effects of such convictions in the European Union.[410] In November 2005, the Council adopted Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from criminal records[411] aimed at supplementing and facilitating the existing mechanisms of the 2000 MLA Convention.[412]

Since 2009, three specific instruments are of relevance regarding the recognition of foreign convictions. The first two aim to organise an efficient way to exchange criminal records between member states[413], replacing the 2005 Decision, and establish a European Criminal Record Information System (ECRIS) through central authorities in each member state.[414] The third instrument deals with taking account of convictions in the member states of the EU in the course of new criminal proceedings (FD Previous Convictions).[415] As aforementioned, these three instruments are products of the mutual recognition era-way of thinking, but do not substantially follow the MR principle. Where the ECRIS decisions target an enhanced application of mutual legal assistance for exchanging info, the FD Previous Convictions does not aim at the execution in one member state of judicial decisions taken in another member state, but implies that each member state shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other member states are taken into account to the extent previous national convictions are taken into account.[416] Moreover, while the three instruments are generally cited side by side, the FD Previous Convictions is not restricted to ECRIS in order to obtain information on previous convictions, but also allows for this information to be obtained under the 2000 MLA Convention (see supra)[417]

[410] *European Commission*, White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM/2005/0010, ,25.1.2005.
[411] Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322, 9.12.2005.
[412] Outside the scope of this article, but for a full overview of the exchange of information, see: *Á. Gutiérrez Zarza*, Exchange of Information and Data Protection in Cross-border Criminal Proceedings in Europe. Springer-Verlag Berlin Heidelberg, 2015.
[413] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal records between member states. OJ L 93, 07.04.2009.
[414] Council Decision 2009/31/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA. OJ L 93, 07.04.2009.
[415] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. OJ L 220, 15.08.2008.
[416] Article 3.1 FD Previous Convictions.
[417] Article 3.1 FD Previous Convictions.

FD Previous Convictions could be considered as a less stringent variation of the more explicit mutual recognition instruments, but still imposes a duty to take into account any previous convictions against the same person for different facts in other member states.[418] According to the instrument, a 'conviction' is to be defined as any final decision of a criminal court establishing guilt of a criminal offence.[419] A confirmed verdict of guilt can thus be cited as an aggravating factor in subsequent criminal proceedings and could therefore have an effect on the sentencing for a subsequent offence. As indicated in the succinct member state analysis, the (non-) use of the concept of (degrees of) criminal responsibility affects the offender's legal criminal status. Only individuals who are found guilty of a criminal offence will have this recorded on their criminal register. In Belgium and the Netherlands, a verdict of guilt is decreed when it cannot be established that the mentally disordered offender is not criminally responsible for the act(s) committed. In the Netherlands, when the individual is considered to be slightly diminished responsible, diminished responsible or greatly diminished responsible, (s)he will still receive a guilty verdict which will be mentioned in the criminal register. In England & Wales, under criminal proceedings a verdict of guilt may be decreed even when a hospital order – under mental health regulation - is considered to be the best (post-trial) option, as the decision for an hospital order is not related to the assessment of the individual's criminal accountability (see supra).

The fact that not all countries endorse the accountability doctrine, could have major consequences for mentally disordered offenders. This could amount to an ambiguous situation where a prior English conviction will be taken into account in a new foreign procedure - because a verdict of guilt was decreed by an English court - and will aggravate the sanction in subsequent criminal proceedings, even though there is a possibility that the offender would have been criminally unaccountable for the act(s) committed in the legal system of the inquiring state. The instrument however holds some provisions – though only in its recital – to prevent this: The Framework Decision contains no obligation to take into account previous convictions "where a national conviction would not have been possible regarding the act for which the previous

[418] This duty is obligatory only to the extent that a comparable offence exists in the national law. See: Janssens, 2013 (fn. 236), pp. 169 & 179.
[419] Article 2 FD Previous Convictions.

conviction had been imposed or where the previously imposed sanction is unknown to the national legal system".[420]

While this seems to resolve some of the unwanted ambiguity based on different accountability doctrines, the choice for the term 'act' in the instrument casts a shadow of doubt vis-à-vis its interpretation. Moreover, it is simply stated that the instrument contains no obligation to take such previous convictions into account, which prompts the question has to how to interpret this optional nature. In terms of interpreting the notion of 'an act', it remains unclear whether this term comprises the (legal term for a) crime itself, therefore consisting of both the *actus reus* (the actual act of committing a felony) and *mens rea* (the so-called guilty mind) elements, or whether just the *actus reus* would suffice to make this ascertainment.[421] If the latter interpretation were to be followed, the mental status of the offender would be vacuous and solely the appreciation of the fact that was committed would matter. This in essence, would come down to a straightforward double criminality test.

Reiterating the diverse accountability doctrines, this clarification would seem sorely needed. It could be argued that in countries endorsing (a variation of) the accountability doctrine, there is a possibility that no verdict of guilt would have been decreed regarding the act itself since the mentally disordered individual could have been considered to be criminally unaccountable (hence, full absence of, or sufficiently diminished, *mens rea*), and the judgment would not provoke consequences in case of recidivism and not aggravate a subsequent sanction. In this context, recital 8 provides an interesting addition, stating that "where, in the course of criminal proceedings in a Member State, information is available on a previous conviction in another Member State, it should as far as possible be avoided that the person concerned is treated less favourably than if the previous conviction had been a national conviction." This could be interpreted so that, referring to the English example above, Belgian or Dutch courts can assess a mentally disordered defendant's previous conviction in England & Wales in terms of recital 8 to conclude that, based on the diversion doctrine and the subsequent hospital order, this previous conviction would not have been possible in terms of guilt and criminal accountability attribution under their own legal systems. However, this is but a mere interpretation of how this provision *might* provide a solution for mentally ill offenders and the potential ambiguity

[420] Recital 6, second paragaph FD Previous Convictions.
[421] Blomsma, 2012 (fn. 397); *J. Keiler*, Actus Reus and participation in European Criminal law, Intersentia School of Human Rights Research Series, Volume 60, Cambridge UK: Intersentia, 2013.

they may encounter based on the diverse accountability doctrines. Moreover, this interpretation seems to conflict with the specific wordings and purpose of the FD Previous Convictions, as an unaccountability plea would not have resulted in a national conviction in terms of Article 2 of the instrument requiring the establishment of guilt.

A final option can be found in Article 3.1 of FD Previous Convictions, stating that "each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States (…) are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law." Based on this *equivalence* principle, it could be argued that no legal effects can be attached in subsequent Belgian or Dutch proceedings to a previous English/Welsh guilty verdict where the person involved was transferred to a forensic hospital and diverted out of the criminal justice system, because this way of disposal in case of a guilty verdict is unknown to Belgium or the Netherlands.

Lastly, the second optional ground proposed in recital 6 is the argument that the previously imposed sanction is unknown to the national legal system. This could be significant as, for example, under the Belgium regime reference could be made to the fact that an English/Welsh guilty verdict (in combination with a hospital order) could never trigger a Belgian internment measure due to its dichotomous system, rendering the imposed mental health measure therefore unknown to the Belgian legal system. Again, this remains a mere interpretation and it remains to be seen how member states – with the optional character of recital 6 in mind – will appreciate prior foreign convictions in a context of mental illness and/or (diminished) criminal (un)accountability.

As an indication hereof – and relevant to the member states under scrutiny in this chapter – Mujuzi[422] studied the recognition of foreign convictions from EU member states in the United Kingdom. While not specifically focusing on foreign convictions of mentally disordered persons, the analysis of the U.K. case-law corresponds with the findings of this chapter: That there is great diversity within the EU in the way member states conduct their trials and decide on

[422] *J.D. Mujuzi*, The Recognition of Foreign Convictions From Member States of the European Union in Criminal Trials in the United Kingdom: Emerging Issues, European Criminal Law Review (EuCLR), 5(1), 2015, pp. 86-106.

specific convictions which prompts the need to establish criteria that have to be followed in determining whether or not it is safe to admit a foreign conviction. Moreover, the analysis of the UK case law showed a relevant difference between the analysis and appreciation of a foreign conviction from a member state (intra-EU) and those from third-country states (extra-EU). Lastly, the suggestion was defended that there is a need for guidelines to be established stipulating specific details that should be included in the documents aimed at the recognition of a foreign conviction, because currently – in this contribution, at least for what concerns the U.K. – there is a lack of sufficient information.[423] With relevance to the mentally disordered defendant and the establishment in this research of the issues with effective participation (chapter 2) and investigative measures (chapter 4), the U.K. case law analysis also showed the reluctance of the majority of the judges to accept the possibility of not admitting a foreign conviction based on the argument that the conviction was the result of an unfair trial.

Apart from taking account of actual foreign convictions and the potential issues described above, the exchange of information through ECRIS proves a handy instrument and may shed some light on the information crux when dealing with foreign convictions. When looking at the ECRIS Decision's Annex A and the different tables and codes to identify offences, there is a handful of serviceable information, regardless of the specific doctrine for guilt attribution applied in a national legal system. Under the common table of offences categories, the Annex foresees the possibility to identify "Exemption from criminal responsibility: Insanity or diminished responsibility". In addition to this, the common table of penalties and measures categories allows to identify whether the person was subjected to "submission to medical treatment or other forms of therapy" (code5001) and/or "placing in a psychiatric institution" (code7001). This can definitely be considered valuable information when taking account of a foreign conviction. The notion that a member state might be dealing with a person (formerly) characterised by a therapeutic or psychiatric past should impel it to tread lightly when assessing the person's responsibility in new (criminal) proceedings, and prompt the potentially necessary additional safeguards in order to ascertain their effective participation and the legality of investigative measures.

[423] Mujuzi, EuCLR 2015 (fn. 422), pp. 105-106.

IV. Recognition and execution of foreign judgments imposing custodial sentences or measures involving deprivation of liberty

Like the exchange of criminal records and the recognition of foreign judgments, cross-border cooperation with a view of recognizing and executing sentences has its predecessors on a Council of Europe (CoE) level: The Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 (CoE Convention) and the Additional Protocol to this Convention of 18 December 1997 (Additional Protocol)[424] initially catered the need to facilitate cross-border transfers of sentenced persons. Following the inception of mutual recognition in criminal matters, the Council Framework Decision 2008/909/JHA (Framework Decision 909)[425] applied the MR principle to judgments imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. Since its entry into force, this Framework Decision replaces the CoE Convention and its Additional Protocol, but does not replace multilateral and bilateral agreements where they allow for an enhanced transfer of prisoners or facilitation of the enforcement of sentences.

The instrument allows for offenders to be transferred back to their countries of origin where they are in familiar surroundings, closer to friends and family and understand the language.[426] However, the consent of the transferred person nor that of the executing state is needed to initiate such a transfer when certain conditions are met.[427] The instrument primordially aims at a fast-paced relocation to the member state of nationality of the sentenced person where he or she lives.[428]

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[424] Both the CoE Convention and its Additional Protocol are available via this link: http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm

[425] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 5.12.2008. For a comprehensive overview of this instrument as a whole, see: *G. Vermeulen & M. Meysman*, Handbook on the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. European Commission (in press), 2016.

[426] It needs mentioning, however, that the initiative of transferring someone to another member state belongs entirely to the issuing state. See: Article 4.5. of FD 909. The person concerned as well as the executing state may request to initiate a procedure but this constitutes no obligation for the issuing state whatsoever.

[427] See the conditions in Article 6 FD 909.

[428] When an expulsion or deportation order is included in the judgment (or when it is consequential to it), transfer can be sought to the member state of nationality without the habitual residence obligation. See Article 4, 1. (a) and (b) FD 909. Moreover, the option remains to transfer the sentenced person to any other member state, without an evident link to the sentenced person, but this requires the consent of both the person and the sought state. See: Article 4.1. (c) FD 909.

According to its Article 3(1) the purpose of the instrument is to establish the rules under which a member state, with a view to facilitating the social rehabilitation of the sentenced person, is to recognize a judgment and enforce the sentence. As such, the instrument requires that both states endorse the facilitation of the social rehabilitation of the sentenced person as a prerequisite for the transfer of the sentence. While this is the official pinnacle of FD 909, the instrument omits a clarification as to what needs to be understood in terms of both social rehabilitation and its facilitation. The only direct reference in the instrument can be found in Recital 9, where it is stated that "In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State." A potential explanation for the absence of a definition in the instrument is the lack of a consensus regarding the concept itself.[429] Apart from the social rehabilitation objective, Article 3(4) stipulates that the instrument shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union (TEU). A combined reading dictates that no transfer may be sought under this instrument when it has not been adequately established that there will be a facilitated social rehabilitation, as well as sufficiently guaranteed that fundamental rights will remain respected.

As is made clear from its Article 1 on the definition of a sentence, judgments – following the establishment of the offender's full or partial criminal unaccountability due to a mental disability – imposing an internment measure or a TBS or hospital order – or any other measure possible under the law of the member states which would serve a similar purpose – are included in the definition used in the instrument, as they consist a) of measures involving the deprivation of liberty, b) imposed for a limited or unlimited period of time c) on account of a criminal offence d) on the basis of criminal proceedings.[430] In addition, so-called combined

[429] See, f.i.: *D. van Zyl Smit & S. Snacken*, Principles of European Prison Law and Policy: Penology and Human Rights, Oxford, Oxford University Press, 2009, pp. 73-85; *G. Vermeulen & E. Dewree*, Offender Reintegration and Rehabilitation as a Component of International Criminal Justice?, Antwerpen, Maklu, 2014.

[430] This *does* propose a cooperation issue (in terms of applying the instrument) regarding the diversion model of England & Wales: a Belgian or Dutch mentally ill offender receiving a hospital order in England & Wales will not be able to be transferred to his/her country of nationality and residence under the Framework Decision's provisions, since a hospital order implies that

sentences – where a judicial authority has deemed it necessary to impose a mix of the custodial regime together with another measure involving a deprived liberty – are enclosed. [431]

With the recognition and execution of judgments concerning mentally disordered offenders firmly included in its scope and with its purpose of facilitating their social rehabilitation, the instrument seems fit to provide a welcome opportunity to transfer this population within the area of freedom, security and justice in order to provide them an optimised rehabilitation pathway ideally suited to reduce/redeem both personal and societal harm. This preliminary conclusion, however, is hampered by the instrument's own position towards mentally disordered offenders.[432] Besides the general imprecision with which the social rehabilitation purpose was installed (blurring an effective assessment hereof)[433], what little provisions the instrument dedicates to mentally disordered offenders are seemingly aimed at abating actual transfers: The instrument allows the competent authority of the executing state to opt (no mandatory grounds for non-recognition exist, so this decision is voluntary) to invoke a ground for non-recognition or non-enforcement if (part of) the sentence imposed includes a measure of psychiatric or health care that cannot be executed by the executing State in accordance with its legal or health care system.[434] Before such a decision on non-recognition can be made, however, consultation between both states is mandatory[435] and it should be assessed whether a partial recognition (de facto the recognition of the custodial part of the sentence, or at least the part involving the deprivation of liberty that would not include a psychiatric or health care-component) would be feasible in terms of the facilitation of the social rehabilitation and restricted by the condition that the enforcement may not result in an aggravated duration of

the offender is diverted out of the criminal justice system based on mental health regulations (as opposed to strict criminal proceedings), implying that the instrument is simply not applicable according to Article 1(b) FD 909.

[431]Vermeulen & Meysman, 2016 (fn. 425); Meysman, IJLP 2017 (fn. 290).

[432] Apart from the social rehabilitation crux and the issues with optional non-recognition for measures of psychiatric care, the only explicit reference to mentally disordered offenders can be found in Article 6, 3. where the instrument acknowledges the specifics about their right to be heard – and where necessary, to consent – regarding the envisioned transfer, by stipulating that, where the issuing State considers it necessary in view of the sentenced person's age or his or her physical or mental condition, the opportunity to state his or her opinion orally or in writing regarding the transfer will be given to his or her legal representative.

[433] A clear example of the blurred interpretation of the enhanced social rehabilitation purpose can be found in the 2011 study of *Vermeulen et al.* on Framework Decision 909 and the cross-border execution of judgments involving deprivation of liberty. The results of this EU-wide study showed that 33% of the respondents assumed that serving a sentence in the prisoner's home state would automatically facilitate their social rehabilitation, rather than assessing this on a case-by-case basis and with due consideration of the state's legal and detention systems. See:Vermeulen, Van Kalmthout, Paterson, Knapen, Verbeke & De Bondt, vol. 40 2011 (fn. 150), pp. 47-55. The mapped out results (per member state) can be found in: Vermeulen, Van Kamthout, Paterson, Knapen, Verbeke & De Bondt, vol. 41 2011 (fn. 150).

[434] Article 9.1 (k) FD 909.

[435] Articles 9, 3. & 10 FD 909, read in combination, provide for this mandatory consultation.

the sentence.[436] An example may be that when it consists of a combined sentence, the member states may opt – in consultation – to a transfer to the executing state where an evidenced link may be established (closer to family, friends, representatives/native tongue, culture and surroundings/etc.) to execute the non-psychiatric and/or health care part and then allow the sentenced person to serve this latter part in the issuing state.

Another observation needs to be made regarding the aforementioned obligation that the cross-border recognition and enforcement of a sentence may not result in its aggravation in terms of nature and/or duration. This tenet stems from instrument's take on the continued enforcement of a foreign sentence, whereby such a sentence decided in the judgment of the issuing State needs to be recognized and enforced in the executing State without adaptation (see supra as well)[437], safe for two exceptions: Firstly when the sentence of the issuing State exceeds the maximum penalty provided for similar offences under the national law of the executing State, the latter may adapt the sentence in terms of its duration. The adapted sentence shall, however, not be less than the maximum penalty provided for similar offences under the law of the executing State.[438] Secondly, when the sentence of the issuing State is incompatible with the national law of the executing State in terms of its nature, the latter may adapt it to the punishment or measure provided for under its own law for similar offences. The competent authority of the executing State has to make sure, however, that the adapted punishment or measure shall correspond as closely as possible to the original sentence imposed in the issuing State. Moreover, it is impossible for the competent authority of the executing State to convert the original sentence into a pecuniary punishment.[439]

The discretion of the executing State to adapt the original sentence when its incompatibility with the executing State's national legal regime is proven, is however limited by a protective threshold stating that the adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration.[440] This implies that any adaptation resulting in a situation where the sentenced person would have to serve an adapted sentence that is of a

[436] Article 8, 4. FD 909.
[437] Article 8.1. FD 909.
[438] Article 8.2. FD 909.
[439] Article 8.3. FD 909.
[440] Article 8.4 FD 909.

longer duration than the original sentence, or where the sentenced person would have to serve an adapted sentence that, by its nature, is an *aggravation*, is contrary to the instrument's objective. As a result hereof, the issuing State retains the possibility to withdraw a sought transfer, should it consider the intended adaptation contrary to its initial intentions for transferring the sentenced person.[441] Again, where the assessment of longer duration is relatively straightforward, the instrument would benefit from a specification as to what would constitute an aggravated sentence in terms of its nature. Ideally, and in sync with the purpose of the instrument, *aggravating* would be any adaptation contrarious to the facilitation of the sentenced person's social rehabilitation and/or infringement of his or her fundamental rights. Applied to mentally disordered offenders, this would imply an adaptation of a foreign measure resulting in diminished opportunities for (mental) health-treatment and care, hampering the development of both personal and societal protection. Yet, like the facilitation of social rehabilitation itself, a clear-cut definition was omitted.

Lastly, the instrument's provisions on sentence enforcement/execution deserve some attention. FD 909 clearly states that the enforcement of the sentence shall be governed by the law of the executing State.[442] This also means that the executing state's law will govern all the potential modalities regarding the execution – in terms of early or conditional release, earned remission and suspension – of the sentence post-recognition. This is a logical step as the executing state is on the receiving and executing end of the cooperation, but it is contradicted by provisions clarifying that the issuing State still has a margin of discretion regarding this enforcement of the sentence. According to Article 17.3, the competent authority of the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provision on possible early or conditional release. When this information is provided, the issuing State may agree to the application of such provisions or may choose to withdraw the certificate and end the transfer process. This potential withdrawal may only take place as long as the enforcement of sentence in the executing state has not yet commenced.[443] Notwithstanding this observation, it still permits an issuing State – at any stage prior to the

[441] Article 12.1 prescribes that, when adaptation is considered necessary (both in terms of duration and/or nature) the competent authority of the executing State shall as quickly as possible inform the competent authority of the issuing State of its intention to adapt the sentence. The combined reading of Articles 12.1 and 13 FD 909 foresee the retention of the issuing state's right to withdraw.
[442] Article 17 FD 909.
[443] Following from a combined reading of Articles 17.3 and 13 FD 909.

enforcement, but (preferably) when both states have communicated on the appropriateness of the sought transfer – to request information on the sentence execution modalities of the executing State upon which the latter must reply with accurate information, allowing the issuing State the option to withdraw should the sentence execution modalities fail to achieve its appreciation. In the state-analysis, the diverse measures and sentence modalities (based on the applicable accountability doctrines) were indicated, prompting the question has to how their subsequent and specific sentence execution modalities would be appreciated in a cross-border context. Given the indicated particular nature of a mentally disordered offender's sentence and imposed measure(s), it remains to be seen how issuing states will appreciate the enforcement modalities applicable in the executing state. On a final note, the sustained under-clarification inherent to the instrument clouds insight on the exact motivation for an issuing state to withdraw. Ideally, this should presume an analysis of the social rehabilitation purpose (see supra) of the (mentally ill) offender but it remains underdeveloped and unclear whether the latter will benefit from such decisions.

The comparative assessment of the situation in Belgium, the Netherlands and England & Wales demonstrated that all jurisdictions have differing rules regarding mentally disordered offenders in terms of the importance they attach to criminal accountability. Although it is reasonable to conclude that all member states have systems in place for separating - to a certain degree - mentally disordered offenders from *normal* offenders and from non-offending psychiatric patients according to their individual needs for treatment and/or the degree of danger that they constitute to the public, a similar conclusion applies to the disposal options following a sentence. Based on the accountability approach, these options differ exponentially.

A Belgian internment order, Dutch TBS order or an English/Welsh hospital order can therefore not simply be assimilated in terms of clinical care and treatment available to mentally ill offenders, nor can they be considered equal from a legal perspective. With the observations on the nebulosity of the social rehabilitation purpose and the prohibited aggravation of a sentence's nature, as well as the caveat regarding the optional non-recognition in mind, it pays to provide a few examples of how this would/could potentially complicate cooperation in criminal matters in the AFSJ.

An emblematic example hereof can be found in the Belgian and Dutch implementation of the instrument itself. Being a Framework Decision, it allowed member states a certain discretion to adapt the instrument to their national laws, prompting Belgium and the Netherlands to implement legislation that explicitly excludes the recognition and execution of a foreign judgment imposing a measure of psychiatric and/or health care nature. Both the Belgian *Wet inzake de wederzijdse erkenning van vrijheidsbenemende straffen*[444] and the Dutch *Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*[445] contain a provision (respectively Article 12, 7° and Article 2:13) that moves beyond the optional scope of the ground for non-recognition found in FD 909's Article 9, 1.(k) and turned its optional character into a mandatory obligation. Hence, both countries have *de facto* installed a veto against any potentially sought transfer containing these measures and excluded, on a compulsory basis, cross-border cooperation on the recognition and execution of such judgments. The recent ECtHR case-law where Belgian internees crossed the border to the Netherlands (see supra) and FD 909's principal focus on transferring sentenced persons to the state with which he or she as an established attachment based on nationality and/or habitual residence both support the necessity and feasibility of cooperation. Hence, it is a somber conclusion that the intended enhanced cooperation through the instrument is effectively humbug between these two neighboring member states (and any other). In practice, this would imply a continuous refusal to recognize and execute Belgian internment decisions by the Dutch competent authorities, as the dichotomous approach does not allow for combined sentences and completely separates an internment measure (following the established unaccountability) from a penal detention sentence. Yet, this mandatory non-recognition is also applicable in situations where a combined sentence cannot (partially) be executed in accordance with the legal or health care system of a member state, and equally complicates cooperation. According to the Dutch (graded) system, an offender with diminished criminal accountability may be sentenced to a combined sentence: One share consisting of a clear custodial sentence for the part for which he or she may be considered criminally liable and one share consisting of the actual TBS aimed directly at the treatment of the sentenced person in order to enhance his or

[444] "Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie", 15 May 2012, BS 08 June 2012.
[445] "Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties", 12 July 2012, STB 19 July 2012, availeble via: http://wetten.overheid.nl/BWBR0031814/geldigheidsdatum_23-09-2015.

her changes to recover and, ultimately, be reintegrated in civil society.[446] Confronted with such a sought transfer and forwarded judgment, Belgium would mandatorily have to refuse because of the psychiatric/health care element of the judgment and the assessment that its national legal or health care system is incompatible as the Belgian approach does not recognize graded criminal accountability and the subsequent combined sentence. Article 9.3 and Article 10 of the instrument provide, however, that prior to any decision on this non-recognition, consultation between both states is mandatory and it should be assessed whether a partial recognition – in this case the recognition of the custodial sentence – would be feasible in terms of the facilitation of the social rehabilitation and restricted by the condition that the enforcement may not result in an aggravated duration of the sentence. This in itself is not unfeasible: When a custodial sentence is combined with a TBS order under Dutch law, the prison sentence will be executed first. As such, the Belgian authorities might theoretically consider the recognition of this first part, in order to allow the person to spend his prison sentence within a (more) familiar context.[447] With this in mind, it is important to note that the Netherlands do not apply the principle that penalties (such as prison sentences) will be adapted depending on the degree of guilt that can be attributed to the individual. Hence, there is the potential for a mentally disordered offender who bears diminished responsibility for his action(s) to receive a relatively high prison sentence, but this in turn is countered by the provision of Article 10.2 that such a partial recognition and enforcement may not result in the aggravation of the duration of the sentence. Under Belgian law[448], this implies that the adapted sentence must correspond to the maximum penalty applicable under Belgian law for similar offenses, with the limitation that this may not constitute a prolonged duration vis-à-vis the original sentence. At length, when no agreement on the (partial) recognition can be achieved, or when the issuing state is not content with the communicated adaptations and/or (partial) recognition, the latter may withdraw the certificate.[449] Lastly, even when such an agreement is achieved, the issuing state still has the withdrawal option should it not be content with the

[446] *J.W. Fokkens & M.I. Veldt*, Gevangenisstraf en TBS: een moeizame relatie tussen een straf en een maatregel, Trema, 2000, pp. 33-34.

[447] While the consultation on a potential partial recognition is mandatory in cases of measures of psychiatric or health care (Article 9, 1 (k) FD 909), the partial recognition itself is still a voluntary decision (Article 10 FD 909).

[448] Article 18 of the Belgian Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie.

[449] Article 13 FD 909.

sentence execution modalities, as long as it decides on this withdrawal prior to the enforcement of the sentence in the executing member state.

All of the above clearly requires alacrity of the parties involved, while their implementation legislation by contrast shows a reluctance to cooperate regarding mentally disordered offenders requiring a measure of psychiatric or health care. Apart from the Belgian-Dutch imbroglio, the England & Wales Anglo-Saxon approach poses a cooperation issue by its diversion method's inherent tactic: a Belgian or Dutch mentally ill offender imposed with a hospital order in England & Wales will simply not be able to be transferred to his/her country of nationality and residence under the Framework Decision's provisions (regardless of the aforementioned mandatory refusal of psychiatric measures) since a hospital order implies that the offender is diverted out of the criminal justice system, resulting in a deprivation of liberty not based on criminal proceedings but mental health regulations[450], implying that the instrument is simply not applicable according to Article 1(b) FD 909. All of this demonstrates the troubled application of the Framework Decision to this specific category of offenders: While *prima facie* an apt instrument to enhance cross-border transfers and facilitate social rehabilitation, its intrinsic blind spot for mentally ill offenders hampers these ideals and rains on their parade.[451]

V. Conclusion

The concise analysis of the accountability doctrines of the selected member states and the correlation with the mutual recognition instruments aiming to support European cooperation in criminal matters in the EU, demonstrated that insufficient account was taken of the disparity between European jurisdictions when it concerns the (non) use of (degrees of) criminal accountability. Consisting of one of the very fundaments on which penal systems are built, the under-appreciation of accountability doctrine-variation for mentally ill offenders in the EU seems neglectful. While this is perhaps on par with the classic mutual recognition tenet of 'unity

[450] The Mental Health Act 1983 (amended in 2007), available via: http://www.legislation.gov.uk/ukpga/1983/20/contents

[451] The European Organisation of prisons and Correctional Services (EuroPris). Expert Group on Framework Decision 909. Report. http://www.europris.org/europris-report-framework-decision-909/ . o. The experts conclude that more attention should be paid to the problematic application of the Framework Decision to this small but problematic group of offenders. It was therefore recommended that an additional study would be carried out with a goal to further tackle this problem and it was suggested that this issue would be highlighted by EuroPris as a focal point in 2013.

through diversity', the provided examples in this chapter indicated that, because of this blind spot, mentally disordered offenders risk to be discriminated against in cross-border proceedings, while smooth and efficient cross-border cooperation is at risk due to the unforeseen or unaddressed complexities they entail.

Chapter 6: Detention conditions in the EU and the principle of equivalence of care for mentally disordered offenders.

Under the fourth and final research line, the placement and subsequent treatment and care of mentally disordered offenders was scrutinized. Focusing on Belgium as a concrete example and starting from a case-law analysis of all the ECtHR cases regarding Belgium that confirm breaches of the fundamental rights of mentally disordered offenders in a detention context, the research then explored an analogous approach and interpretation of ECtHR and CJEU case law in the area of the Common European Asylum System (CEAS). Through this cross-analysis, the article defends the idea that under certain circumstances (when a structural deficiency vis-à-vis detention conditions or the equivalence principle can be established in a member state) cooperation in criminal matters in the field of sentence execution – through Framework Decision 909 could and should be hampered. Moreover, it analyses the purpose of the FD 909 (enhancing the prospect of social rehabilitation for the transferred detainee) against the backdrop of these evidenced breaches and laments the ambiguous approach towards the mutual recognition principle and fundamental rights.

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This is Madness: Detention of Mentally Ill Offenders in Europe.
The tension between cross border cooperation in the European Area of Freedom, Security and Justice and the fundamental rights of mentally ill offenders in detention.

Abstract: In two recent judgements, the European Court of Human Rights (ECtHR) has given an alarming signal regarding the placement, care and treatment of mentally disordered offenders in Belgium. This article analyses these judgements and the Court's assessment that Belgium faces a structural problem regarding the detention of people with a mental illness in prison. By exploring other recent ECtHR decisions across the EU and combining this with an analysis of international norms and standards, it contends that there is something amiss regarding the post-trial approach towards mentally disordered offenders in an EU-wide context. The potential hazards of this situation, from both an individual and an EU perspective are then presented by analysing the EU Framework Decision on the transfer of prisoners (which aims to facilitate offender rehabilitation) and the EU Court of Justice's interpretation of the relationship between instruments like the Framework Decision that are based on mutual recognition and fundamental rights. Lastly, the EU's initiative for enhancing procedural rights in criminal proceedings through the Roadmap trajectory, and the subsequent Commission Recommendation of 27 November 2013, are scrutinized. Based on this research, the article pinpoints the flaws and vacuums that currently exist for mentally disordered offenders, and the negative outcome this may have on the legitimacy and effectiveness of the European Area of Freedom, Security and Justice.

Keywords: mentally disordered offenders – mutual recognition – European Court of Human Rights – Court of Justice of the European Union – fundamental rights

I. Introduction.

The year 2015 began with an alarming signal from the European Court of Human Rights (hereafter: ECtHR) about the continuing structural problems in Belgium regarding the (detrimental) placement, care and treatment of mentally ill offenders. Barely a month into the new year, Belgium could add eight new decisions to its anthology of ECtHR judgements regarding the detention in prison facilities of offenders suffering from mental disorders.[452] Over a period of as little as two years – starting with the definitive ruling by the ECtHR in the case of L.B. v. Belgium on 2 January 2013[453] – Belgium managed to muster a towering collection of 20 judgements against it for breaches of the fundamental principles and safeguards enshrined in the European Convention on Human Rights (hereafter: ECHR or the Convention). In each of these cases, the Court had to rule on the circumstances of the treatment, care and detention in a prison setting of mentally ill offenders (that is, offenders who were found not to be accountable under (Belgian) criminal law because of a mental disorder.[454] Lastly, Belgium became world news with the affair of Mr. Van Den Bleeken, a mentally ill detainee who requested euthanasia because of his unbearable physical suffering[455], engaging both Belgium and the Netherlands in the ensuing debate.[456] Even in the most conservative of interpretations, the accumulated evidence of the past couple of years makes it safe to conclude that something is amiss in this small kingdom when it comes to the way in which mentally ill offenders are treated. Notwithstanding this observation, Belgium is far from unique in the EU in this matter. During the past few years many other European countries have had judgements given against them by the ECtHR in similar circumstances. Last but not least, the following bears repetition[457]:

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[452] European Court of Human Rights (ECtHR), Press Release, Judgments of 3 February 2015 (ECHR 040 2015). The cases Smits and Others v. Belgium & Vander Velde and Soussi v. Belgium and the Netherlands. Available via: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-5004421-6141156.

[453] L.B. v. Belgium, Application No. 22831/08, Judgement (final) 2 January 2013.

[454] *E. Staudt*, Communiqué: "Les internés doivent quitter les prisons", Le Conseil Superieur de la Justice (Press Release), 2014. Retrieved via: http://www.hrj.be/fr/content/communique-les-internes-doivent-quitter-les-prisons-eric-staudt-csj. It is noteworthy that the number of mentally ill people who are detained in prison settings in Belgium is a fraction of the total number of this category of offenders. Approximately 1,100 of such offenders (making up approximately 10% of the total prison population) are currently held in prisons in Belgium. While the majority of prisoners are released on probation or transferred to specialized facilities, it is precisely this 10% who are the subject of the overwhelming majority of judgements and decisions by the ECtHR as well as the negative reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT).

[455] *The Telegraph*, Belgium grants murderer's request for mercy killing, 15 September 2014, via: link; *The Guardian*, Belgium refuses serial rapist and murderer's assisted dying request, 06 January 2015, via: link; *Le Monde*, En Belgique, le détenu qui voulait mourir ne sera pas euthanasia, 06 January 2015, via: link.

[456] *De Morgen*, Waarom internering Frank van den Bleeken bij de noorderburen geen optie was, 06 January 2015, via: link.

[457] *P. Langford*, Extradition and fundamental rights: the perspective of the European Court of Human Rights, The International Journal of Human Rights (IJHR), 13(04), 2009, pp. 512-529; Meysman, Pantopticon 2014 (fn. 53).

the ECtHR's threshold is still at a considerable height, meaning that judgements are handed down only for the worst – and therefore the most obvious – of breaches. When looking at international norms and standards, CPT reports, and indications coming from non-governmental actors, it becomes obvious that many EU Member States fail to meet their obligations towards this vulnerable category of offenders.

This article first discusses these recent ECtHR judgements within a European context. The existing European diversity vis-à-vis the legal approach of offenders with a mental illness – in terms of procedural rights, effective participation, liability outcome etc. – is outside the scope of this article, which instead focuses on the detention conditions of offenders with a mental illness deprived of their liberty.[458] The case law and its implications vis-à-vis the applicable international norms and standards regarding psychiatric detention are analysed. Moreover, the issues raised are discussed within the context of European cooperation in criminal matters. The EU has created a number of instruments – most notably the European Arrest Warrant[459] (hereafter: EAW) – that are aimed at facilitating cross-border cooperation between the EU Member States while simultaneously seeking to enhance the individual rights of the persons involved. Given the collection of serious breaches of mentally ill offenders' human rights, concerns have been raised about how to deal with this specific category of vulnerable defendants when applying these instruments. The European Commission sought to respond to (some of) these issues with the Recommendation on procedural safeguards for vulnerable persons[460], and hence the article touches upon this recent initiative.

[458] As such, differences between the Member States' legal approach towards offenders with a mental illness – for instance, the referenced Belgian system of 'internment', the Dutch system of 'TBS' or the English-Welsh approach of 'diversion' – may imply a different legal outcome in terms of offender liability (see, f.i. Verbeke, Vermeulen, Meysman & Vander Beken, IJLP 2015 (fn. 244)) but are taken into account for this article insofar as they result in the deprivation of liberty.

[459] *Council of the European Union,* Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190/1, 18.07.2002.

[460] *European Commission*, Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused of criminal proceedings, OJ 2013 C 378/8.
Retrieved via: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF.

II. Overview and analysis of recent ECtHR case law regarding the detention of mentally ill offenders.

1. A small kingdom with big issues. Belgium's enduring structural problem.

While the greater number of the cases discussed under this heading were decided in the past two years,[461] the conditions of detention and the standard of care for mentally ill offenders[462] are a long-standing problem in Belgium. As early as 1993, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT), following their first visit to Belgium, set out some serious concerns regarding the situation for interned detainees.[463] A crucial factor in the treatment of mentally disordered individuals who have committed a crime is whether they are criminally responsible or accountable for the act(s) committed. Because individuals who are not accountable are (at least partly) found not to be guilty, it is generally recognized that they should not be placed in ordinary correctional settings.[464]

The CPT, however, lamented the shortage of available and qualified doctors[465] and the fact that local staffing, facilities and equipment in the infirmaries at some of the prisons visited were not likely to provide satisfactory medical treatment and nursing care[466], and concluded that in general the practice of accommodating detainees in 'psychiatric annexes' (separate wings) in prisons provides them with neither the observation and psychiatric care, nor the staff and

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[461] L.B. c. Belgique, appl. No. 22831/08 (def.), judgment 02 January 2013; Dufoort c. Belgique, appl. No. 43653/09, judgment (def.) 10 April 2013; Claes c. Belgique, appl. No. 43418/09, judgment (def.) 10 April 2013; Swennen c. Belgique, appl. No. 53448/10, judgment 10 April 2013; Caryn c. Belgique, appl. No. 43687/09, judgment 09 January 2014; Lankester c. Belgique, appl. No. 22283/10, judgment 09 January 2014; Plaisier c. Belgique, appl. No. 28785/11, judgment 09 January 2014; Gelaude c. Belgique, appl. No. 43733/09, judgment 09 January 2014; Moreels c. Belgique, appl. No. 43717/09, judgment 09 January 2014; Oukili c. Belgique, appl. No. 43663/09, judgment 09 January 2014; Saadouni c. Belgique, appl. No. 50658/09, judgment 09 january 2014; Van Meroye c. Belgique, appl. No. 330/09, judgment 09 January 2014; Smits et autres c. Belgique, appl. Nos. 49484/11, 53703/11, 4710/12, 15969/12, 49863/12, 70761/12, judgment 03 February 2015; Vander Velde et soussi c. Belgique et Pays-Bas, appl. Nos. 49861/12 and 49870/12, judgment 03 February 2015.

[462] Under this heading these constitute, as aforementioned, so-called internees under the Belgian system. As such, they may not be considered as offenders by other legal systems, in part due to the fact that they will not necessarily be people who have been convicted by a (criminal) court or have been through (criminal) trial and procedures.

[463] *CPT*, Rapport au Gouvernement de la Belgique relatif à la visite effectuée par le Comité européen pour la prevention de la torture et des peines ou traitements inhumains ou degradants (CPT) en Belgique du 14 au 23 novembre 1993, CPT/Inf (94) 15, §§ 175-211. Hereafter: CPT 93.

[464] Under Belgian law, a person found criminally unaccountable for the offence committed is 'interned'. This is a protective measure and not a punishment, as was confirmed by highest court in Belgium, the Court of Cassation: ",…, internement n'est pas une peine, mais, tout à la fois, une mesure de sécurité sociale et d'humanité, dont le but est de mettre le dément ou l'anormal hors d'état de nuire et, en même temps, de le soumettre dans son propre intérêt, à un régime curatif scientifiquement organize", Cass. 25 March 1946, Pas. 1946, I, para. 116.

[465] CPT 93 (fn. 463), §§ 161, 188, 189.

[466] CPT 93 (fn. 463), § 162.

infrastructure, of a proper psychiatric hospital or institution.[467] In conclusion, the CPT stated that "in all respects, the standard of care for patients placed in psychiatric annexes is below the minimal acceptable standard from both an ethical and human point of view".[468]

Almost simultaneously with the publication of the CPT's report in 1994, a Mr. Aerts, backed by the European Commission of Human Rights,[469] started an application for alleged breaches of Articles 5 §1, 5 §4, 6 §1 and Article 3 of the Convention. In 1998 the ECtHR concluded in its judgement of Aerts v. Belgium[470] that there had been a breach of Article 5 §1 (because the right to liberty is jeopardized when there is no apparent connection between the purpose of the deprivation of liberty – protection, care and treatment – and the specific place and conditions of the detention, being a psychiatric wing of a prison; specifically, Article 5 §1, e) addresses the lawful detention of persons of unsound mind) and a breach of Article 6 §1 (because the applicant's right to a fair trial was violated by the refusal to give him legal (pecuniary) aid, which denied him the possibility of bringing his case before the Court of Cassation). For its judgement and the appreciation of the Belgian situation, the Court drew heavily on the CPT's earlier report.[471] Both the report and the Aerts ruling confirmed that one should not be deceived by the adjectives *forensic* and *psychiatric*, as (Belgian) forensic prison wings cannot be seen as appropriate institutions for treating mentally disordered offenders who were held not to be accountable.

Following the Aerts judgement, and in spite of the Belgian response to the CPT report[472], hardly anything changed for the better regarding the position of mentally disordered offenders. Legislative changes were proposed, postponed and ultimately abandoned, budgets and staffing remained inadequate, and planned infrastructure developments proved to be little more than a mirage. An illustrative example was the announcement by the Belgian government in response to these CPT reports that a so-called 'Penitentiair observatie en klinisch onderzoekscentrum' (POKO) would be created; this would be a clinical observation centre

[467] CPT 93 (fn. 463), § 191.
[468] Ibid. Literally: "A tous égards, le niveau de prise en charge des patients placés à l'annexe psychiatrique était en-dessous du minimum acceptable du point de vue éthique et humain."
[469] Before the entry into force (in 1998) of Protocol 11 of the ECHR, individuals did not have direct access to the Court and had to lodge their application with the Commission; the Commission would then launch a case before the Court should it deem the case well-founded.
[470] Aerts v. Belgium, Application No. 25357/94, Judgement 30 July 1998.
[471] Ibid., para. 66.
[472] Rapport Intérimaire & Rapport de suivi du Gouvernement belge en réponse au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relative à sa visite en Belgique du 14 au 23 novembre 1993. Retrieved via: Rapport intérimaire and Rapport de suivi.

designed specifically to address the need for proper mental health assessments. The centre was, however, never realized in practice.[473] Nonetheless, the Belgian government enjoyed a period of relative calm before the issue of mental health came back into the headlines in 2011 with the case of De Donder and De Clippel,[474] in which the parents of a young interned offender successfully lodged a case alleging the violation of Article 2 (right to life) and Article 5 ECHR due to their son's detention in the ordinary section of a prison.

With hindsight, the De Donder and De Clippel case seems to have started the avalanche of judgements that we are currently witnessing, as this time barely one year passed before a new judgement was given. In the case of L.B. v. Belgium, the applicant claimed, again based on the conditions and timespan of his detention, that there had been violations of Articles 5 §1 and 6 ECHR In its judgement, the Court made an assessment from the point of view of the applicant by taking into account the severity and treatability of the applicant's condition and the lack of appropriate care and treatment provided in the correctional facilities in which he was being detained.[475] The Court noted that the Belgian Social Protection Commission[476] had regularly stated, from 2005 onwards, that the applicant's placement in a psychiatric prison wing was provisional, until a better option could be found. Even the Social Protection Commission found that the psychiatric wing of a prison was not an appropriate place for the applicant to receive the care he required with a view to his rehabilitation.[477] The period of his provisional detention was included in this assessment as well.[478] Secondly, and in much the same way as in the De Donder and De Clippel case, the Court assessed the government's efforts to alter the applicant's specific situation[479] by also taking into account the underlying context of scarce resources and the measures taken on a political level to find a solution to this.[480] Thirdly, to substantiate its judgement on the alleged violation, the Court once again incorporated the, by now, various CPT reports and other international norms, standards and international reports.[481] In this way, the Court took a rather benevolent view that accepted the problem of scarce

[473]Casselman, 2009 (fn. 363); Heimans, Vander Beken & Schipaanboord, RW 2015 (fn. 303).
[474] De Donder and De Clippel v. Belgium, Application No. 8595/06, Judgment 6 December 2011.
[475] L.B. v. Belgium, Application No. 22831/08 (def.), judgment 02 January 2013, paras. 94, 99, 100.
[476] The authority that decides on where offenders with a mental disorder who are not criminally accountable should be placed.
[477] Ibid. (fn. 474), paras 95 & 97.
[478] Ibid. (fn. 474), para. 101.
[479] Ibid. (fn. 474), paras 94 & 98.
[480] Ibid. (fn. 474), para. 96.
[481] Ibid. (fn. 474), para. 96.

resources as a reality, assessed the efforts and measures taken by the government to overcome this structural issue and ultimately balanced these considerations against the – potential – infringement of the mentally disordered individual's fundamental rights as derived from the various international sources.

It is interesting to see that the Belgian government, in its counter arguments, attributed (part of) the failures regarding care and treatment to the applicant's own "difficult attitude and particular mental state".[482] This questionable strategy of pointing the finger at an individual's own responsibility (or even accountability) precisely because of their mental vulnerability is, furthermore, obstinately repeated throughout the other cases that have been brought before the Court.[483] Ranging from accusations of "a lack of motivation" or "a bad attitude and personality" to the more legitimate "severity of the psychiatric disability", the government applies a spurious circular reasoning in which the cause of the applicant's lack of appropriate accommodation, missing therapy and flawed progress is attributed to the specific mental disorder that resulted in the applicant being deemed not to be criminally liable and to be in need of particular care and treatment in an appropriate (forensic psychiatric) institution. The Court has taken little notice of this alleged defence and instead stresses the *notorious* issue that Belgium has numerous offenders detained in inappropriate conditions.[484] Ultimately, and for motives similar to those in the Aerts case, the Court decided there had been a violation of Article 5 §1 ECHR.

Likewise, all of the recent judgements deal with – and confirm – breaches of the obligations regarding the lawful detention of persons of unsound mind (Article 5 §1 (e) ECHR). Alongside this, an individual's entitlement to take proceedings under which the lawfulness of his or her detention is to be decided speedily by a court and his or her release ordered should this detention not be lawful (Article 5 §4 ECHR) has become a popular ground under which violations have been confirmed. The Court specifically laments the lack of an accessible and effective (legal) route for the review of the applicant's claims of arbitrary or inadequate

[482] Ibid. (fn. 474), para. 82.
[483] In the cases (see fn. 461): Dufoort v. Belgium, para. 87; Claes v. Belgium, para. 87; Swennen v. Belgium, para. 79; Caryn v. Belgium, para. 39; Plaisier v. Belgium, para. 51; Gelaude v. Belgium, para. 48; Moreels v. Belgium, para. 53; Oukili v. Belgium, para. 40; Saadouni v. Belgium, para. 59; Van Meroye v. Belgium, paras 68 and 80.
[484] De Donder and De CLippel (fn. 474), para. 96.

detention before the Social Protection Commission[485]. A substantive element in the Court's motivation is the repeated finding that there is a "structural problem in Belgium regarding the approach and management of offenders with mental disorders"[486], as a result of which offenders are detained in inappropriate conditions like psychiatric wings annexed to prisons and face flawed care and treatment opportunities resulting in their chances of rehabilitation or effective therapy being diminished. Notwithstanding this firm position taken by the Court, the Court has only held, in the cases of Claes (2013) and Lankester (2014), that this finding amounted to a violation of Article 3 ECHR regarding the prohibition of torture and inhuman or degrading treatment.

It can be argued that this indicates the high threshold that an applicant must cross in order to succeed when presenting a case in Strasbourg regarding Article 3, especially when – as was indicated in the cases of Aerts and L.B. – the Court takes a rather benign attitude towards a government that can convincingly argue that it is operating within a context of scarce resources and infrastructure problems and that the detention in an inappropriate correctional facility is to be seen merely as a provisional and temporary measure. A lengthy debate on the Article 3 threshold is beyond the scope and focus of this article, but what clearly stands out is the systematic failure of the Belgian government to handle this specifically vulnerable population adequately and to a high standard; this has resulted in a plethora of evidenced breaches of ECHR rights that has ultimately escalated into two decisions directly related to detention that resulted from the violation of the fundamental right not to be tortured or treated inhumanly.[487]

[485] In the cases (fn. 461): Claes v. Belgium; Van Meroye v. Belgium; Saadouni v. Belgium; Moreels v. Belgium; Oukili v. Belgium; Gelaude v. Belgium; Smits and others v. Belgium.
[486] In the cases (fn. 461): Dufoort v. Belgium, para. 70; Claes v. Belgium, para. 99; Lankester v. Belgium, paras 67 and 93; Van Meroye v. Belgium, para. 82; Saadouni v. Belgium, para. 61; Moreels v. Belgium, para. 55; Oukili v. Belgium, para. 52; Plaisier v. Belgium, para. 53; Gelaude v. Belgium, para. 50; Caryn v. Belgium, para. 41.
[487] In recent years, the Belgian government sought to remedy the large amount of interned offenders in detention settings. Two forensic psychiatric centres (FPC) were planned with currently one completed and operational in Ghent. The second FPC in Antwerp is scheduled to open in 2016, and recently a third FPC was announced in Hofstade. Moreover, and for the first time in its history, Belgium recently announced a long stay solution for untreatable interned offenders at the *Universitair Psychiatrisch Centrum Sint-Kamillus* in Bierbeek. Sint-Kamillus allows for thirty internees with no treatment or recovery trajectory. The current Minister of Justice has furthermore announced that, by 2019, all of the internees will be removed from a prison context. Retrieved from http://www.koengeens.be/news/2015/09/17/langdurig-geinterneerden-krijgen-opvang-buiten-gevangenismuren; http://deredactie.be/cm/vrtnieuws/regio/oostvlaanderen/1.2484113;

2. A few more bad eggs? ECtHR evidence of an EU-wide problem.

While Belgium's internment detention record may on its own pose a serious problem for the proper functioning of the European Area of Freedom, Security and Justice (hereafter: AFSJ), it is worth acknowledging that Belgium is not an isolated case. A quick overview of recent ECtHR judgements reveals that there is a strong tension between mental health care and the approach taken in detention in the Member States of the EU. Recent exemplary cases in which the Court found that there had been violations of Article 3 can be found in the United Kingdom, France, Romania, Poland, Hungary, etc.[488], contain similar observations to those found in the Belgian case law on structural problems regarding overcrowded prison conditions, and, more importantly, reiterate that there is a clear connection between the ground that justifies the deprivation of liberty – i.e. the detention of a person of unsound mind – and the place and conditions of detention.

The Court accepts the reality across Europe of scarce resources in forensic psychiatry and therefore allows, at least to a certain extent, the provisional and temporary detention in inappropriate correctional facilities of individuals who are not criminally accountable and who are mentally disordered. The actual detention of such persons, however, can only be regarded as lawful for the purposes of Article 5 §1 (e) ECHR if it takes place in a hospital, clinic or another appropriate institution, and if this is not the case the treatment may amount to torture or inhuman and degrading treatment.

III. Beyond the Court: European diversity and the substandard treatment of mentally ill offenders.

The example of Belgium and the recent ECtHR case law may serve as an indication of the way mentally ill offenders may be dealt with across the EU, but since the Court is the only mechanism through which sanctions can be applied to breaches of these principles in today's

[488] Keenan v. the United Kingdom, app. No. 27229/95, judgment 3 April 2001; Rivière v. France, app. No. 33834/03, judgment 11 July 2006; Renolde v. France, app. No. 5608/05, judgment 16 October 2008. In this case, the Court also found a violation of Article 2's right to life; Rupa v. Romania, app. No. 58478/00, judgment 16 December 2008; Slamowir Musial v. Poland, app. No. 28300/06, judgment 20 January 2009; Raffray Taddei v. France, app. No. 36435/07, judgment 21 December 2010; Z.H. v. Hungary, app. No. 28973/11, judgment 8 November 2011; Ketreb v. France, app. No. 38447/09, judgment 19 July 2012. In this case, the Court also found a violation of Article 2's right to life; G. v. France, app. No. 27244/09, judgment 23 February 2012; M.S. v. the United Kingdom, app. No. 24527/08, judgment 3 May 2012; Ticu v. Romania, app. No. 24575/10, judgment 1 October 2013.

practical reality (following the exhaustion of the local remedies), this case law ultimately remains but the tip of the iceberg, as only cases that are successfully lodged are presented to the public and analysed by scholars. Moreover, this case law covers only the most severe situations, which unfortunately implies that certain guarantees may not be enforced to their full extent without there being an effective remedy before the Court. Last but not least, because of their specific vulnerability, mentally disordered offenders may find it difficult to access the protection mechanisms offered by the ECtHR.[489] In addition, Member States' practices may not be compliant with international norms and standards beyond the Convention, or with principles enshrined in non-binding instruments.

With over half of the 28 Member States running prisons with occupancy levels above capacity[490], it is not surprising that the mental health status of detainees may potentially be affected and that mental health problems are often undertreated. Although most prisons across Europe have special units for mentally disordered prisoners, sufficient treatment and care cannot usually be offered, which implies that correctional mental health care staff will have to concentrate mainly on the most urgent situations.[491] Against this backdrop, it is useful to identify the relevant norms and standards as well as analyse the relevant literature and studies that have dealt with mentally disordered offenders from an EU-wide perspective.[492] This analysis clearly indicates that Member States' approaches to the placement and care of mentally disordered offenders differ greatly.

1. International norms and standards.

When a person is assessed as not criminally accountable because of a mental illness and is placed in a situation in which they are the subject of a measure aimed at the protection of society as well as their care and treatment, it is a valid starting point to argue that this societal protection should never come before the basic rights to care and treatment of a person who is

[489]Verbeke, Vermeulen, Meysman & Vander Beken, IJLP 2015 (fn. 244).
[490] See the International Centre for Prison Studies' (ICPS) latest state on the Prison Population (Rate) in Europe, available via: http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14.
[491]Blaauw, Roesch & Kerkhof, IJLP 2000 (fn. 9).
[492]Vermeulen, Van Kalmthout, Paterson, Knapen, Verbeke & De Bondt, vol. 40 2011 (fn. 150); Vermeulen, Van Kamthout, Paterson, Knapen, Verbeke & De Bondt, vol. 41 2011 (fn. 150); *S. Fazel & J. Baillargeon*, The Health of Prisoners. The Lancet, 377 (9769), 2011, pp. 956-965; Dressing, Salize & Gordon, EP 2007 (fn. 9); Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9); Dressing & Salize, APS 2006 (fn. 9); Gordon & Lindqvist, PB 2007 (fn. 347); Salize & Dressing, 2005 (fn. 1); *S. Fazel & J. Danesh*, Serious mental disorder in 23,000 prisoners: A systematic review of 62 surveys. The Lancet. 359, 2002, pp. 545–550.

in need. Moreover, the generally accepted principle of *normalization* or *equivalence* in prison medicine is the standard that obliges prison health services to provide prisoners with care of a quality equivalent to that provided for the general public in the same country.[493] In addition, numerous non-binding international documents and instruments have documented this benchmark.[494] These norms and standards are derived from this principle and require that prisoners assessed as vulnerable will be accommodated in that area(s) of a prison as is most convenient and appropriate for monitoring and treatment by health care staff,[495] and that Member States adopt laws or policies to ensure that every prisoner has access to appropriately qualified medical personnel in the prison at all times.[496] Member States also need to ensure that all prison staff receive appropriate training at regular intervals throughout their career[497] and, more specifically, that members of staff who work with particular groups of prisoners such as detained mentally disordered defendants or offenders receive particular training for their individual work.[498] In addition, the equivalence benchmark implies that when a prisoner cannot be granted appropriate care within the prison walls, (s)he must be transferred to more specialized in-patient facilities.[499] The CPT argues in this context that "on the one hand, it is often advanced that, from an ethical standpoint, it is appropriate for mentally ill prisoners to be hospitalized outside the prison system, in institutions for which the public health service is responsible. On the other hand, it can be argued that the provision of psychiatric facilities within the prison system enables care to be administered in optimum conditions of security, and the activities of medical and social services intensified within that system".[500] Exceptions to this general rule are not as rare as might be expected.[501] They mainly result from a lack of adequate resources and placement options for this population of offenders. In several Member States, limited capacity in forensic hospital settings therefore results in the placement in

[493] Article 12 UN ICESCR. In a valuable contribution to the on-going debate, Lines, IJPH 2006 (fn. 4), defends the idea that this equivalence implies the need for a higher health care standard for prisoners that goes beyond mere equivalence, because detention cannot be considered equivalent to the outside world of society.
[494] Article 40 EPR; Articles 10, 11, 12, 19 & 52 R(98)7; Article 35 R(2004)10 ; Standards 31, 32 & 38 CPT 2002; Article 22 UN SMR; Article 1 UN PME; Articles 1 & 20 UN PPPMI.
[495] See, for example, Articles 12, 39, 43, 46 & 47 EPR; Standard 43 CPT 2002; Articles 22 & 62 UN SMR.
[496] See, for example, Articles 1, 2 & 4 R(98)7; Article 40 EPR; Standards 34 & 41 CPT 2002; Article 24 UN SMR; Article 24 UN BOP.
[497] See, for example, Articles 8, 76 & 81 EPR; Article 47 UN SMR.
[498] See, for example, Article 10 R(82)17; Article 12 R(2004)10; Article 81 EPR; Standards 41 & 43 CPT 2002.
[499] See, for example, Articles 12, 42 & 46 EPR; Articles 8, 9 & 35 R(2004)10; Articles 3, 7, 43, 44, 45, 46, 47 & 55 R(98)7; Standards 35, 36, 37 & 43 CPT 2002; Articles 22 & 62 UN SMR; Articles 9 & 20 UN PPPMI; Article 9 UN BPTP.
[500] CPT standards ('Health care services in prisons' (Extract from the 3rd General Report [CPT/Inf (93) 12]) and 'Involuntary placement in psychiatric establishments' (Extract from the 8th General Report [CPT/Inf (98) 12]), para. 43. Retrieved via: http://www.cpt.coe.int/en/docsstandards.htm.
[501] Salize & Dressing, 2005 (fn. 1), p. 72.

correctional settings of people fulfilling the legal criteria for specialist forensic treatment (see infra).

Although most of these instruments are of a non-binding nature, the strength of the norms and standards they contain may also be seen from their effect in ECtHR case law. As mentioned above, the Court, in order to reach its verdicts, is increasingly taking account of reports issued by the CPT when it assesses Member States' compliance with non-binding norms and standards.[502] Moreover, to draw up these reports, the CPT uses its own standards[503], but these have been derived from the same norms and standards.[504] The CPT's work is to be seen as comprehensive and representative in its evaluation of Europe-wide practices since it covers care and treatment not only in strictly correctional settings, but also in forensic prison wings and facilities for persons whose admission to a psychiatric establishment has been ordered in the context of criminal proceedings (high or medium security forensic hospitals and forensic wards in psychiatric or general hospitals).[505]

Table of referenced legislation :

Organisation/source	Instrument	Article(s)/Standards	Acronym
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx	UN International Covenant on Economic, Social and Cultural Rights (1966) (binding)	Article 12	UN ICESCR
United Nations http://www.ohchr.org/EN/ProfessionalIn	Standard Minimum Rules for the Treatment of Prisoners (1955)	Articles 22, 24, 47, 62	UN SMR

[502] See (fn. 489): Slawomir Musial v. Poland, para. 96; Dybeku v. Albania, para. 48 ; Rivière v. France, para 72.
[503] CPT standards ('Health care services in prisons' (Extract from the 3rd General Report [CPT/Inf (93) 12]) and 'Involuntary placement in psychiatric establishments' (Extract from the 8th General Report [CPT/Inf (98) 12]). http://www.cpt.coe.int/en/docsstandards.htm.
[504]The CPT standards make explicit reference to Recommendation No. Recommendation R(98)7 concerning the Ethical and Organisational Aspects of Health Care in Prison as a source of inspiration. (CPT standards - Health care services in prisons, 30.
[505] Ibid. (fn. 504) standards 25 & 26.

terest/Pages/TreatmentOfPrisoners.aspx			
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/MedicalEthics.aspx	Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982)	Article 1	UN PME
United Nations http://www.un.org/documents/ga/res/46/a46r119.htm	Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)	Articles 1, 9 and 20	UN PPPMI
United Nations http://www.un.org/documents/ga/res/43/a43r173.htm	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)	Article 24	UN BOP
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx	UN Resolution on the Basic Principles for the Treatment of Prisoners (1990)	Article 9	UN BPTP
Council of Europe https://wcd.coe.int/ViewDoc.jsp?id=955747	Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (European Prison Rules)	Articles 8, 12, 39, 40, 42, 43, 46, 47, 76, 81	European Prison Rules (EPR)
Council of Europe https://bip.ms.gov.pl/Data/Files/_public/	Recommendation R(1998)7 concerning the Ethical and Organisational Aspects of Health Care in Prison	Articles 1, 2, 3, 4, 7 10, 11, 12, 19, 43, 44, 45, 46, 47, 52, 55	R(98)7

bip/prawa_czlowieka/zalecenia/987.pdf			
Council of Europe http://www.coe.int/t/dg3/healthbioethic/Activities/08_Psychiatry_and_human_rights_en/Rec%282004%2910%20EM%20E.pdf	Recommendation R(2004)10 concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorders	Articles 8, 9, 12, 35	R(2004)10
Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) http://www.cpt.coe.int/en/documents/eng-standards.pdf	CPT standards (2002) – Health Care Services in Prisons & Involuntary Placement in Psychiatric Establishments	Standards 31, 32, 34, 35, 36, 37, 38, 41, 43	CPT 2002
Council of Europe http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/Umluvy/vezenstvi/R_82_17_treatment_dangerous_prisoners.pdf	Recommendation R(1982)17 concerning Custody and Treatment of Dangerous Prisoners	Article 10	R(82)17

EU, Council of the European Union http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008F0909&from=EN	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union	Articles 1, 3, 4, 6, 8, 9, 10	FD 909

2. EU-wide studies on mentally ill offenders and their treatment across Europe.[506]

As indicated by an EU-wide study[507], placement will largely depend on the causal relation between the mental state of the offender and the crime(s) committed.[508] When this causal relation is apparent, specific forensic care must be provided to these individuals. Since forensic psychiatry is a sub-speciality of psychiatry and an auxiliary science of criminology, this forensic care and treatment will focus not only on the amelioration of the mental disorder, but also on a reduction in the risk of re-offending. This care is provided throughout the EU within the correctional system in dedicated prison wings or in high or medium security forensic hospitals, but could also include care in forensic wards of psychiatric or general hospitals.[509] In addition to these variable practices, for each one of these placement options Member States provide a variety of service types, which differ considerably with regard to their organization as well as their quantity or intensity of care. Some Member States, for example, offer special forensic services for offenders with specific mental disorders. In most cases these are services for substance abusers and sex offenders.[510] This diversity leads these researchers to conclude that "a consistent, Europe-wide system of classification for forensic facilities based on functional criteria would be preferable for a number of purposes, including research or health-reporting.

[506] These studies are extensive and cover the entire spectrum of the way in which mentally ill defendants are treated. For the scope of this article, however, only the relevant information regarding the accommodation, care and treatment of mentally ill offenders was taken into account.
[507] Salize & Dressing, 2005 (fn.1).
[508] One should bear in mind that a causal relationship between mental health and the crime(s) committed can also be apparent in the case of mentally disordered offenders who are accountable for their actions. They too are in need of specific forensic care programmes.
[509] Salize & Dressing, 2005 (fn.1), pp. 43, 67 & 68.
[510] Salize & Dressing, 2005 (fn. 1), pp. 67 & 70.

Unfortunately, no such system currently exists".[511] In addition to this diversity, a more worrying conclusion in many of the studies is that substandard care and treatment is provided to mentally disordered offenders. In the 2011 study by Vermeulen et al.[512], it was established that certain Member States did not adopt laws or policies specifically requiring that prisoners with mental health difficulties should be entitled to care appropriate to their circumstances that was commensurate with the type of care available for people with similar mental health difficulties in the community, did not have laws and policies in place ensuring that vulnerable prisoners are accommodated in such area(s) of the prison as is most convenient and appropriate for monitoring and treatment by health care staff, had not adopted laws or policies to ensure that every prisoner has access to appropriately qualified medical personnel in the prison at all times, and had not adopted laws or policies to ensure that members of staff who work with vulnerable groups of prisoners should receive appropriate training.[513] The 2007 EUPRIS study identified similar problems regarding psychiatric prison beds, mental health care staff in prison and the training of mental health care staff [514], and even stated that, in routine care in European prisons, even the most basic requirements for adequate treatment often seem to be missing.[515] The 2000 study by Blaauw and others of 13 Member States[516] established that there were similar problems in these countries, making it fair to say that the problems that have been identified are persistent.

IV. Repercussions for the European Area of Freedom, Security and Justice.

Conceived at the Tampere Council of 1999[517], the AFSJ was created to ensure the free movement of persons and to offer a high level of protection to citizens. With the traditional concept of state sovereignty and the specific nature and delicacy of criminal law in mind, the AFSJ has been called one of the most far-reaching constitutional developments in (recent) EU law.[518] An important part of the AFSJ was to provide the EU with an answer to the increasing

[511] Salize & Dressing, 2005 (fn.1), p. 67.
[512]Vermeulen, Van Kalmthout, Paterson, Knapen, Verbeke & De Bondt, vol. 40 2011 (fn. 150)).
[513] Ibid, Annex 1.
[514]Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), pp. 22-27.
[515]Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), p. 6.
[516]Blaauw, Roesch & Kerkhof, IJLP 2000 (fn. 9).
[517] *European Council*, Presidency Conclusions, 15-16.10.1999. The Tampere Council was given practical expression in the criminal law context in a well-structured twenty-four measure programme adopted in 2001, with mutual recognition featuring high on the EU's justice and home affairs agenda ever since. *Council of the European Union*, Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters. OJ C 12, 15.01.2001.
[518] Mitsilegas, 2012 (fn. 14), p. 24.

mobility of crime and the subsequent cross-border nature of criminal procedures. To address this, the EU adopted the principle of mutual recognition as the bedrock for judicial cooperation in criminal matters within the AFSJ.[519] The aim and purpose of mutual recognition is that in an area of freedom, security and justice, judicial decisions should circulate freely from one Member State to another and be treated as equivalent.[520] To effect this, the Tampere Council Conclusion 33 stated that "enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights."

From this, it is absolutely clear that mutual recognition follows a strictly identified two-way path: the facilitation of judicial cooperation and the enhanced protection of individual rights. The bedrock for this enhanced recognition and cooperation was clarified by the Programme of Measures, which stated that "implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law".[521] As such, mutual recognition is based on a common and reciprocal mutual trust, between the Member States, that their criminal justice systems, and the (judicial) decisions resulting therefrom, are firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law.[522]

The above-mentioned studies and their continual laments about the substandard quality (the primary concern) and wide diversity (a more practical assertion) across Europe, in combination with the ECtHR's judgements corroborating these claims, however, demonstrate an accurate image of the present quagmire in which mentally disordered offenders find themselves. This begs the question of how the EU will and should deal with this in the Area of Freedom, Security and Justice. The confrontation with continual indications of practices contrary to the presupposed commitments of the members should prompt a substantive response.

[519] This principle originally hailed from the single market policy area, and the change from a policy aimed at facilitating freedom and mobility – and thus at removing restrictions – to a more coercive policy targeting the unwanted side-effects of this mobility – increased cross-border criminality – has not been flawless (Möstl, CMLR 2010 (fn.21)).
[520] Morgan, 2010 (fn. 31), p. 232.
[521] Ibid. (fn. 517) Programme of Measures, para. 6.
[522] Ibid. (fn. 517) Tampere, Conclusion 1.

1. Mentally disordered offenders in cross-border situations. Assessing the need and feasibility of an EU approach.

Before we can look at the repercussions for the instruments based on mutual recognition that are under investigation in this article, we need to establish that there is indeed a platform for dealing with mentally disordered offenders on an EU level. Such affirmation should come from both practical exigency and legislative competency. As for the first requirement, it pays to look back briefly at the ECtHR judgements mentioned above. In two of these cases a cross-border element was present: in the case of Lankester (2014), the applicant fled to the Netherlands. This prompted the Belgian government to demand – on the basis of Article 68 of the Convention implementing the Schengen Agreement – that the Dutch authorities should resume the detention, and this led to the incarceration of the applicant in the Netherlands. The applicant was released some time later, and then again apprehended in Belgium following a routine verification of his identity. The Dutch authorities then solicited the Belgian authorities to execute the measure that required the deprivation of liberty in the Netherlands; this prompted no positive reply, and ultimately this led to an ECtHR judgement that there had been a violation of Articles 3 and 5 ECHR. In the recent case of Vander Velde and Soussi (2015), the applicant fled to the Netherlands where he was apprehended and returned by the Dutch authorities (despite his opposition) following the issuing of a European Arrest Warrant by the Belgian government. Again, this case culminated in a confirmed violation of Article 5 ECHR. Both cases may serve as examples of the problems that mentally disordered offenders may face in cross-border situations.[523]

Apart from this, the aforementioned studies lament the paucity of information[524] combined with the substandard screening methods and general under-identification of mental vulnerability, the overall shortage of evidence about the prevalence of psychiatric and mental

[523] Not included here, because no official cross-border involvement was ever established, is the Van Den Bleeken case. The – theoretical – debate was over the question of whether Van Den Bleeken could or should be transferred to a specialized institution in the Netherlands, and whether this was possible under the Treaty that Belgium and the Netherlands had previously agreed to on the provision of the Dutch penitentiary of Tilburg for Belgian prisoners (see: Verdrag tussen het Koninkrijk België en het Koninkrijk der Nederlanden over de terbeschikkingstelling van een penitentiaire inrichting in Nederland ten behoeve van de tenuitvoerlegging van bij Belgische veroordelingen opgelegde vrijheidsstraffen, 31 oktober 2009, BS 1 februari 2010, p.4287) and/or under the Framework Decision on the transfer of prisoners (see: Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 5.12.2008).

[524] Salize, Dreßing, & Kief, EUPRIS 2007 (fn. 9), p. 6.

health care in prisons, which has been described as "nothing less than dramatic"[525], and finally the fact that "even the most rudimentary health reporting standards for mental health care in prisons are lacking almost everywhere in Europe"[526] which "at least imply the possibility of a much higher number of mentally vulnerable persons involved in cross-border proceedings that slip through the net".[527] All of this contributes to establishing the need for a comprehensive approach, and moreover indicates the relevance of the problem in the AFSJ. Notwithstanding the fact that the (established) mentally ill offenders remain a minority within the general offender population, this group is most likely under-identified. When it finds itself in a cross-border context then it is in dire need of additional safeguards. In terms of competency, the EU itself has – seemingly – settled this debate by developing a rather flexible interpretation of Article 82(2) TFEU[528] when it comes to introducing additional (procedural) safeguards for individuals involved in criminal proceedings (see infra).[529]

2. Mutual recognition in the light of EU diversity and substandard care and treatment. The Framework Decision on the transfer of prisoners.[530]

The so-called FD 909 applies the principle of mutual recognition to judgements imposing custodial sentences or measures involving the deprivation of liberty. Hence, this instrument targets the more 'classical' outcome of a criminal proceeding, where convicted offenders are deprived of their liberty.[531] FD 909 aims at enhanced cooperation by envisioning a fast-paced relocation (with limited options for refusal) to the Member State of nationality of the sentenced person where they live, or to the Member State of Nationality when an expulsion or deportation order is included (or consequential to) the judgement, even though this is not the

[525] Ibid., p. 71.
[526] Ibid., p. 71.
[527] Meysman, EuCLR 2014 (fn. 299), p. 190.
[528] According to Article 82(2) of the Treaty on the Functioning of the European Union (TFEU), only "to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States."
[529] Seemingly, because it remains to be seen how well the Member States will respond and comply with the minimum procedural guarantees that are envisaged.
[530] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 5.12.2008 (hereafter: FD 909).
[531] Before the inception of FD 909, The Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 (CoE Convention) and the Additional Protocol to this Convention of 18 December 1997 (Additional Protocol) were aimed at facilitating cross-border transfers of sentenced persons. With the entry into force of FD 909, both these instruments were replaced.

State of the sentenced person's habitual residence (FD 909, Article 4, 1. (a) and (b)). Moreover, there remains an option to transfer the sentenced person to any other Member State (without an evident link with the individual[532]), but this requires the consent of both the person and the state (FD 909, Article 4, 1. (c)). The purpose of the instrument, according to Article 3(1), is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognize a judgement and enforce the sentence. As such, the instrument requires that both states[533] endorse the facilitation of the social rehabilitation of the sentenced person as a prerequisite for the transfer of the sentence. Moreover, Article 3(4) stipulates that the instrument shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles that is enshrined in Article 6 of the Treaty on the European Union (TEU). A combined reading logically concludes that no transfer may be sought under this instrument when it has not been adequately established that social rehabilitation will be facilitated, or when there is not a sufficient guarantee that fundamental rights will remain respected.

As is made clear from Article 1 on the definition of a sentence, decisions imposing detention (or any other given appellation possible under the laws of the Member States) are included in the definition used in the instrument, as they consist of a) measures involving the deprivation of liberty that are b) imposed for a limited or unlimited period of time c) on account of a criminal offence and d) on the basis of criminal proceedings.

At first glance, the instrument therefore provides an interesting opportunity for the transfer of mentally disordered offenders with a view to facilitating their social rehabilitation prospects (hence, *at minimum* their care and treatment will be aimed at reducing the potential for personal and societal harm) whilst safeguarding their individual rights. However, the instrument itself firstly seems to diminish the actual prospect of transferring mentally disordered offenders, and, secondly, the instrument operates within the AFSJ context of mutual trust-based cooperation in criminal matters. We will look at these two points in turn.

[532] For completion, there remains one other option: to 'transfer' the execution of the judgement to the Member State to which the sentenced person has fled or has otherwise returned. In this scenario, there is no actual transfer of the person, but the mere recognition and execution of the original detention sentence or measure that deprives him/her of his/her liberty (see FD 909, Article 6, 2. (c)) by the Member State to which the person has fled or returned. In this scenario no consent is needed from the individual, but consent is still required from the state that will execute the judgement.

[533] In the terminology of mutual recognition, these are, respectively, the issuing state (the state that issues the demand for transfer) and the executing state (the state that recognizes and executes the foreign judicial decision).

Considering the first, Article 9.1 (k) provides that the competent authority of the executing state may opt (under FD 909, there are no mandatory grounds for non-recognition) to refuse to recognize a judgement or to enforce a sentence if (part of) that sentence includes a measure of psychiatric or health care that cannot be executed by the executing state in accordance with its legal or health care system. In this way, the executing state may still decide to refuse to recognize a judgement should it become clear that the transfer would not benefit the mental health treatment of the sentenced person because – and this remains a sad assertion, however just it might be – the sentence is incompatible with its legal or health care system. A combined reading of Articles 9, 3. and 10, however, leads to the conclusion that prior to any such decision to refuse recognition, consultation between the two states is mandatory and an assessment should be made of whether a partial recognition – *in casu* the recognition of the custodial part of the sentence, or at least the part involving the deprivation of liberty that does not include a psychiatric or health care component – would be feasible in terms of the facilitation of the individual's social rehabilitation,[534] but under the condition that the enforcement may not result in an aggravated duration of the sentence (FD 909, Article 8, 4.).

All of this may protect a sentenced person with mental health care needs against a possible deterioration of their position, but the instrument does not explicitly foresee a positive obligation for the Member States.[535] As such, it has the potential to prevent both transfers that are *undesired* – because of incompatible psychiatric or health care provisions in the system of the state to which the application is made – and also those that are *unwanted* – that is, the recognition and execution of judgements that impose (sometimes) lengthy, costly and difficult psychiatric measures – without providing a clear cut alternative.

An example of this can be found in the Belgian implementation of the Framework Decision: Belgium's *Wet inzake de wederzijdse erkenning van vrijheidsbenemende straffen*[536] (hereafter: Wet WEVS) explicitly prohibits the recognition and execution of a judicial decision when this judgement includes a measure that has a psychiatric and/or health care nature (Wet WEVS, Article 12, 7°). Although seemingly equivalent to FD 909's Article 9, 1. (k), the Belgian Wet WEVS

[534] An example may occur when a combined sentence is given, and the Member States opt – in consultation – to a transfer to the executing state where an evidenced link is established (the offender is closer to family, friends or representatives or is able to use his/her native tongue, or be in his/her own culture and surroundings, etc.) for the non-psychiatric and/or health care part, and then for the sentenced person to serve the latter part of the sentence in the issuing state.
[535] Vermeulen & Meysman, 2016 (fn. 425).
[536] "Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie", 15 mei 2012, BS 08 juni 2012.

moves beyond the optional nature of the ground for refusal and makes the refusal mandatory. In this way, the Belgian government has *de facto* installed a veto against any potential certificate containing these measures and has excluded, on a compulsory basis, cross-border cooperation on the recognition and execution of such judgements. Recalling that FD 909's main focus is on transferring a sentenced person to the state with which they have an established link based on nationality and/or habitual residence, this furthermore implies that intended return of mentally ill Belgian offenders who are sentenced abroad is called into question. Although this is just one example – and, for example, the Dutch government similarly decided to make this a mandatory ground for refusal in Article 2:13 of its own implementation Wet[537] – the reciprocity of cross-border cooperation and the mutuality of trust assumed by the EU leave little or no room for Member States to go *cavalier seul*, as this undermines the basic premise of the AFSJ.

Alongside the analysis that the instrument itself allows for an exclusion of psychiatric/health care measures and therefore, in a broader sense, for the refusal of transfers of mentally disordered offenders, there is the – second – global argument about the context in which the instrument operates, which is the AFSJ context of mutual trust-based cooperation in criminal matters. Hence, and notwithstanding the explicit references to the purpose of social rehabilitation[538] and the obligation to respect fundamental rights, the presupposed compatibility of the Member States' legal systems and detention facilities with the principles of freedom, democracy and respect for human rights as enshrined in various (international) norms and standards is the cornerstone on which the instrument should operate. As such, any transfer of a mentally disordered offender that might successfully occur needs to pass this threshold. It has already been established that many a Member State has – albeit with various degrees of severity – shown signs of incompatibility regarding the detention, care and treatment of

[537] Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties. Retrieved from http://wetten.overheid.nl/BWBR0031814/geldigheidsdatum_30-06-2015.

[538] However, there is no clarification as to what exactly is meant in terms of both the social rehabilitation itself and its facilitation. The only direct reference can be found in Recital 9 of the instrument, where it states that "In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State." A possible explanation for the absence of a precise definition is that the concept is still the matter of much debate (see: van Zyl Smit & Snacken, 2009 (fn. 429), pp. 73-85; Vermeulen & Dewree, 2014 (fn. 429)).

mentally disordered offenders. The implications of this for the efficiency and desirability of using FD 909 for transferring such offenders remain obscure:

- The nebulous nature of the purpose of facilitating social rehabilitation may win out against the explicit objective, leading to an approach that allows fast-paced transfers with little consideration for the individual involved. As an early warning of this, the 2011 study of Vermeulen et al. on the instrument and on the cross-border execution of judgements involving the deprivation of liberty showed – using the results of an extensive questionnaire given to respondents throughout the Member States – that 33% of the respondents assumed that if prisoners served their sentence in their home state this would automatically facilitate their social rehabilitation, rather than assessing this on a case-by-case basis and with due consideration of the state's legal and detention systems.[539]
- Furthermore, as no official refusal based on human rights is foreseen in the instrument, it leaves unanswered the question of whether a Member State may refuse cooperation because of serious concerns in this area.

With a small sidestep to the ECtHR's and CJEU's recent rulings in cases concerning the transfer of asylum seekers, this article clarifies these potential issues for transferring mentally disordered offenders using FD 909, and the general consequences for the AFSJ.

3. A textbook example of a *systemic failure*? The Belgian situation in the light of the asylum rulings by the CJEU and the ECtHR.

In the cases heard in the ECtHR[540] and the CJEU,[541] both Courts had to assess the application of the principle of mutual trust in the context of transferring asylum seekers between Member States.[542] The (earlier) ECtHR judgement had to assess whether or not the transfer of an asylum

[539] Ibid. Fn. 513., pp. 47-55.
[540] M.S.S. v. Belgium and Greece, 21 January 2011 (30696/09).
[541] European Court of Justice (ECJ), 21.12.2011, joined cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department [2011]; ECJ, 10.12.2013, C-394/12, Shamso Abdullahi v. Bundesasylamt [2013].
[542] *M. Bossuyt*, Belgium condemned for inhuman and degrading treatment due to violations by Greece of EU asylum law: M.S.S. v Belgium and Greece, Grand Chamber, European Court of Human Rights, January 21, 2011. 5, pp. 582-597; *C. Heard & D. Mansell*, The European Arrest Warrant: the role of judges when human rights are at stake. New Journal of European Criminal Law. 2, 2011, pp. 133-147; *F. Billing*, The parallel between non-removal of asylum seekers and non-execution of a Euro-pean Arrest Warrant on human rights grounds. The CJEU case of N. S. v. Secretary of State for the Home Department. European Criminal Law Review, 2, 2012, pp. 77-91; *A. Suominen*, Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts. European Criminal Law Review (EuCLR), 4(3), 2014,

seeker between Belgium and Greece created a real risk[543] that the applicant's Article 3 rights would be violated (M.S.S. v. Belgium and Greece, para. 365). The Court found – by observing various reports by international bodies and NGOs[544] – that these facts had been well known and freely ascertainable from a wide number of sources *before* the transfer of the applicant (ibid, para. 366). The Court therefore considered that, by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to detention that amounted to degrading treatment, in violation of Article 3 (ibid, para. 368).

Prudently following the ECtHR judgement, the CJEU applied (for the most part) the same reasoning (N.S. v. Secretary of State for the Home Department, paras 3, 86, 89, 94, 106 & Conclusion 2) by concluding that the presumption that fundamental rights were protected in all Member States must be rebuttable in situations in which Member States have *systemic flaws* in their asylum procedures and reception conditions for asylum applicants. This was later confirmed – and tightened – in the CJEU's Shamso Abdullahi judgement, (Shamso Abdullahi v. Bundesasylamt, para. 60).

These recent judgements have been heralded as a new beginning for (or even the end of) the Dublin asylum system, and analogies have been drawn to cooperation in criminal matters. One can indeed presume that there is a parallel between a non-consenting asylum seeker being removed to a Member State using the Dublin Regulation and the European Arrest Warrant procedures. In the same way, a (non-consenting) offender being transferred through the use of FD 909 would fit this categorization.

As is correctly observed by Suominen, the position of these individuals should not suffer because the proceedings have a European character, and their rights should not become less protected as the result of mutual recognition being applied.[545] What remains to be established by these individuals in order to oppose such a planned transfer successfully, however, is a rebuttal of the presupposed trust in states' commitment to international (fundamental) norms and standards. Likewise, when a Member State wishes to – or should – refuse cooperation on

pp. 210-235; *W. De Bondt & A. Suominen*, State responsibility when transferring non-consenting prisoners to further their social rehabilitation Lessons learnt from the asylum case law. European Criminal Law Review (EuCLR), 5(3), 2015, pp. 347-370.

[543] Soering v. the United Kingdom, 7 July 1989 (14038/88).

[544] Such as the CPT (M.S.S. v. Belgium and Greece, para. 163), the UNCHR (ibid, para. 213), Amnesty International (ibid, para. 165) and Médecins sans Frontières (para. 166). All these reports confirmed that there were systematic (ibid, para. 161) and severe shortcomings.

[545] Suominen, EuCLR 2014 (fn. 542), p. 223.

the basis of the well-founded establishment of potential human rights infringements, it has to argue against the AFSJ's cornerstone. There is an important distinction between the thresholds set by the ECtHR and the CJEU for doing this successfully. The ECtHR looks to the various reports (see supra) as evidence for a systemic shortcoming in order to conclude that there may be a violation of (among other provisions) Article 3. This means that the Court does not hold that *only* thoroughly demonstrated systemic deficiencies will suffice to halt the transfer (or removal) of a person. The premise of the CJEU, on the other hand, is that pleading systemic deficiencies is the only way. It is likely that this indicates a distinction between the Courts, with the ECtHR playing the role of the protector of the individual, and the CJEU appearing to be more focused on the conformity and uniformity between fundamental rights and the cooperation in criminal matters in the AFSJ.[546]

However, even when the CJEU's higher threshold needs to be applied, for instance when a Member State makes use of the prejudicial procedure of Article 267 TFEU because it has serious concerns regarding systemic deficiencies in a country's approach towards mentally disordered offenders and asks whether it may (or even should) refuse a certificate that has been issued to demand a transfer under FD 909, then, regardless of the fact that no ground exists for a refusal on the basis of fundamental rights, it would be safe to assume that for at least one particular small kingdom in the EU this would be a serious concern. It is precisely the finding of this article (that there seems no way in which Belgium could counter an allegation that it has systemic deficiencies regarding the approach of its legal and detention system towards mentally disordered offenders) that is problematic for the AFSJ.

This conclusion for just one of the twenty-eight Member States (and this article indicated above that currently the conclusion can certainly be drawn for others) may disrupt the entire area. Moreover, Member States appear increasingly less ready to sacrifice fundamental rights and specific safeguards on the altar of rapid cooperation in criminal matters.[547]

[546] Asp et al, 2013 (fn. 226).

[547]Alegre & Leaf, ELJ 2004 (fn. 40); Alegre, 2005 (fn. 40); Suominen, eucrim 2011 (fn. 41); Vermeulen, 2014 (fn. 118). Belgium itself is no stranger to this: early in 2013, it refused the execution of a number of European Arrest Warrants issued by Spain because its competent authorities had serious concerns regarding the detention conditions of an ETA defendant and decided that it could potentially raise fundamental rights violations .This situation of the pot calling the kettle black may lead to a reciprocity in which mutual mistrust takes the upper hand in the Area of Freedom, Security and Justice. See: Meysman, Pantopticon 2014 (fn. 53).

V. The EU's response.

1. Neither hot nor cold? The (CJ)EU's lukewarm approach to fundamental rights in the AFSJ.

As mentioned above, the CJEU serves as a guardian vis-à-vis the relationship between fundamental rights and cooperation in criminal matters in the AFSJ. With its interpretative powers, it holds the key to assuring the conformity and uniformity of the EU's legislative instruments against a backdrop of international norms and standards. Precisely this dual function has prompted the CJEU to prefer a different assessment in asylum cases, creating a more challenging threshold for applicants who are trying to oppose a removal. The reason for this, as one may imagine, is that the Court cannot play *cavalier seul* and move headlong towards a conclusion that places either one of the individual right or the principle of cooperation in criminal matters above the other, but must strive to find a prudent and fitting balance. Nonetheless, a careful observer must confess that, in the past, the Court has (perhaps intentionally) ignored the chance to speak out – and more importantly to set guidelines – on this precarious relationship.

In the Radu case[548] the Court sidestepped the actual prejudicial question of whether the Charter of Fundamental Rights (hereafter: CFREU) would allow a state to refuse to execute a European Arrest Warrant; it reduced its judgement to the assessment of whether such a refusal could be grounded on the assertion that the person was not heard by the issuing authority, and answered this question in the negative. In the Melloni case,[549] the Court concluded that a Member State may not make use of its national (higher) human rights protection to reject a European Arrest Warrant that has been issued and that meets the (lower) protection criteria set by the CFREU. Once again, the Court reiterated that any other assessment would impair the principles of mutual trust and recognition that the Framework Decision aims to increase. Moreover, the Court claimed that such an interpretation would compromise the effectiveness of the Framework Decision because it would question the uniformity of the fundamental rights protection as established by that Framework Decision (Stefano Melloni v. Ministerio Fiscal, para. 63). An important aspect of the Court's reasoning was that the EU had already established

[548] ECJ, 29.01.2013, C-396/11 (Curte de Apel Constanţa v. Ciprian Vasile Radu), [2013]. See: Tinsley, EuCLR 2012 (fn. 232).
[549] ECJ, 26.02.2013, C-399/11 (Stefano Melloni v. Ministerio Fiscal), [2013.]

an harmonisation pathway and therefore, that allowing a higher national level of fundamental rights protection would run counter to the aim of the provision to provide a common understanding of that refusal ground.[550] Hence, in areas where the EU legislator has established (common minimum) definitions at EU level, the member states' margin of action will be smaller than in cases where no common definitions exist and the principle of mutual recognition will be more powerful – with more limited exceptions to this principle – where approximation is available.[551] In both cases, the CJEU thus gave precedence to its role as watchful protector over the soundness of the AFSJ and its principles that underpin mutual recognition in criminal matters. In short, it implied that mutual trust and the assumed conformity by the Member States with fundamental rights may not be hindered by questions as to how these fundamental rights should be upheld in cooperation scenarios that are based on mutual recognition.

While these judgements invoked a fair amount of criticism[552] or relativisation[553], the Court created a complete uproar[554] when it presented its opinion on the EU's accession to the ECHR.[555] This controversy aside, the Court's opinion contained a view that was both interesting and concerning regarding the relationship between mutual trust in the AFSJ and fundamental rights. In paragraph 191 of its opinion, the Court explained that "it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law", before adding in paragraph 194 that "in so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other,

[550]Labayle, 2013 (fn. 235); van der Hulle & van der Hulle, SEW 2014 (fn. 235); Armada, NJECL 2015 (fn. 235).
[551]Janssens, 2013 (fn. 236), p. 204.
[552] Tinsley, EuCLR 2012 (fn. 232).
[553] van der Hulle & van der Hulle, SEW 2014 (fn. 235).
[554] *S. Peers*, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, 2014. Retrieved via: http://eulawanalysis.blogspot.be/2014/12/the-cjeu-and-eus-accession-to-echr.html ; *S. Douglas-Scott*, Opinion 2/13 on EU accession to the ECHR: a christmas bombshell from the European Court of justice, U.K. Constitutional Law Blog, 2014. Retrieved via: http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/
[555] CJEU, OPINION 2/13 OF THE COURT, 18 December 2014.
Retrieved via: http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=nl&type=TXT&ancre.

including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."

From this, the Court concludes in paragraph 258 that "in the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it … does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined …".

While, bearing in mind the Radu and Melloni judgements, this in itself should not be considered as such a shocking conclusion, it is worrying to notice how the Court considers the accession to the ECHR to be contrary to the principle of mutual trust as it would potentially open the gates for a state to check the fundamental rights situation in the Member State that has demanded its cooperation in the AFSJ. Yet, as we have discussed, it is precisely the shared commitment of the Member States to – amongst other things – the ECHR that would allow them to trust each other to begin with. If nothing else, the Court has, with this reasoning, reiterated – in, perhaps for the first time, crystal clear language – that it is trust for trust's sake that is at the helm of the Area of Freedom, Security and Justice.

Looking back at the problems that have been identified in this article and that have led to a growing number of ECtHR judgements, the substantiated evaluation that – most prominently – Belgium has breached the CJEU's own threshold of systemic deficiencies, thus trumps any potential cooperation in the AFSJ, and ultimately the Member States' own increasing weariness with the automatic results of a blind mutual trust, it seems that the EU and its most prominent Court are barking up the wrong tree.

On the 24th of July 2015, the *Hanseatisches Oberlandesgericht* of Bremen, Germany, requested a preliminary ruling from the CJEU in the Aranyosi case[556] and demanded a clarification and interpretation from the Court whether the European arrest warrant is to be interpreted as meaning that extradition is impermissible where there are strong indications that detention

[556] ECJ, 24.07.2015, C-404/15 (Hanseatisches Oberlandesgericht in Bremen/ Pál Aranyosi), Request for Preliminary Ruling, OJ C 320, 28.09.2015. [2015.]
Retrieved via: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CN0404&from=EN.

conditions infringe the fundamental rights of the person concerned. Furthermore, the Bremen court wanted to know if, in such circumstances, a Member State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant and whether it can or must lay down specific minimum requirements applicable to detention conditions. With such a clearly structured demand for clarification/interpretation on the relationship between fundamental rights and detention conditions in a mutual recognition context, the Court's answer is eagerly awaited.

2. The Commission's Recommendation on the rights of vulnerable defendants.

At around the same time as the EU's Court is shifting into a higher gear in the defence of mutual trust as a *per se* principle, the EU has developed a step-by-step approach to try and cater for some of the concerns and criticisms that have arisen with regards to the AFSJ's instruments for cooperation in criminal matters[557] and to address the decline in trust.[558] Following a rough start[559] the Council presented its Resolution[560] endorsing a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (hereafter: the Roadmap). This article focuses only on the Roadmap's instrument that specifically targets suspects or accused persons with a mental disorder as vulnerable defendants.[561] The principal conclusion is the inevitably voluntary character of this instrument. While it is a formal EU instrument, it merely recommends[562] that states strengthen certain procedural rights of vulnerable defendants. Given the issues identified and the considerable legal, monetary and practical burdens to which they would lead should the Member States wish to address them, one must temper one's expectation of seeing an actual change of scenery brought about by this Recommendation. Furthermore, and this is inherent in the Roadmap approach, the Recommendation only targets the specific procedural rights of vulnerable persons from the

[557]Alegre & Leaf, ELJ 2004 (fn. 40); Alegre, 2005 (fn. 40); Nilsson, 2005 (fn. 27); K. Ambos,2008 (fn. 8); Anderson, 2008 (fn.8); Marguery, MJ 2013 (fn.134); Labayle, 2013 (fn. 235).

[558] Vermeulen & De Bondt, 2011 (fn. 34); *B. Thellier de Poncheville*, La confiance mutuelle à l'épreuve du mandat d'arrêt Européen. In D. Zerouki-Cottin (Ed.), L'espace Pénal Européen: À la croisée des chemins? Actes de la journée d'études du 30 mai 2013. Université Jean Monnet Saint-Étienne, France: La Charte, 2013, pp. 29-40.

[559] Vermeulen & van Puyenbroeck, ICLQ 2011 (fn. 8); *J. Blackstock*, Procedural Safeguards in the European Union: a road well travelled? European Criminal Law Review (EuCLR), 2(1), 2012, pp. 20-35; Morgan, EHRLR 2012 (fn. 106); Vermeulen, 2014 (fn. 118).

[560] Council of the European Union (2009). Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

[561]*European Commission*, Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused of criminal proceedings, OJ 2013 C 378/8.

[562] Ibid, Recommendation section1, 2.

time they are suspected of having committed an offence until the conclusion of the proceedings. One of the major issues that has been identified is the post-trial placement (and transfer) of convicted mentally disordered offenders, and this remains unaddressed. This is not illogical because if the EU were to begin to introduce binding minimum norms in the area of the conditions for detention and the procedures for transfer of detainees, an outright refusal (if not uproar) by the Member States would be the result. Nonetheless, and as mentioned above in this article and in many others[563], the EU's flexible interpretation of its competence under Article 82(2) TFEU – by which minimum norms can be introduced but only to the extent that they strengthen mutual recognition in cross-border proceedings – has already raised some eyebrows. Likewise, the Recommendation and its suggestions[564] apply – as explicitly mentioned – in European Arrest Warrant proceedings, but also regardless of any mutual recognition or cross-border connection.

VI. Concluding remarks. Is everyone waltzing to a different tune?

The increasing number of cases from the ECtHR is conclusive about violations of the right to freedom and about unlawful detention, about the lack of an effective (legal) remedy for these situations and, sadly enough, also about violations of the absolute prohibition of torture, inhuman or degrading treatment or punishment throughout Europe. As it turns out, this is just the tip of the iceberg, as mentally ill people deprived of their liberty based on offences committed remain an under-detected, under-protected and – in more cases than one would like to admit – maltreated group of vulnerable people. From a European Union perspective, this brings up the question of how to deal with this category of detainees and with the accumulating evidence of their predicament in the Area of Freedom, Security and Justice.

Within this area, the EU has determined that mutual recognition should be the cornerstone for cross-border cooperation in criminal matters, based on mutual trust between the Member States, with the self-proclaimed purpose of facilitating cooperation whilst simultaneously

[563]De Bondt & Vermeulen, Eucrim 2010 (fn. 118); Morgan, EHRLR 2012 (fn. 106); Lööf, ELJ 2006 (fn. 118); Vermeulen & van Puyenbroeck, 2010 (fn. 118); Vermeulen, 2014 (fn. 118).

[564] Some of them very useful, like suggestion 14 that "Member States should take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty" and suggestion 12 that "vulnerable persons should have access to systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty".

enhancing the individual (fundamental) rights of the persons involved. Confronted with direct questions concerning this purpose and the difficult relationship between mutual recognition and the protection of fundamental rights, the EU's Court of Justice initially – in the AFSJ context of asylum and migration – digressed from the ECtHR reasoning by applying a higher threshold for success in opposing planned removals and transfers, and ultimately – in its opinion on the EU's accession to the ECHR – decided that mutual trust is a *per se* principle that must remain intact regardless of legitimate and necessary concerns related to fundamental rights.

Simultaneously, the EU is developing a new set of safeguards with its Roadmap that adds additional provisions regarding individual (procedural) guarantees to the already well-stacked deck of international norms and standards. For the Member States, this triangle will present the conundrum of how to deal with mutual recognition requests when a positive reply risks a judgement against that state by the ECtHR, while a negative answer opposes the CJEU's mantra that trust must remain unscathed. On top of this, they now risk additional penalties if flaws are found in their Roadmap compliance, while they may very well escape an ECtHR judgement. From the individual's perspective, the perspective of a mentally disordered offender, the instrument (FD 909) that aimed to enhance their social rehabilitation prospects and was designed to transfer them to the state (ideally) best connected to them and best suited for their care and treatment has run into trouble because of the European reality of evidenced breaches of fundamental rights. In a way that matches the CJEU's interpretation, for people in this vulnerable category the *only way* of opposing transfers under FD 909 is by pointing out systemic deficiencies. One has to guess how this could be done by a mentally disordered defendant, given that for one Member State simply to *check* the fundamental rights situation in another Member State is already considered to be contrary to the AFSJ's tenet of mutual trust. The lifeline provided by the ECHR is, furthermore, far away, as the ECtHR's threshold is still considerably high, especially for members of a vulnerable category who are less likely to make a successful application. Lastly, the EU's procedural Roadmap has (thus far) only delivered one instrument that is anywhere near targeting mentally disordered defendants and, by any interpretation, is a dud for convicted mentally disordered offenders.

In anticipation of a decisive ruling by the CJEU on how to interpret fundamental rights in a mutual recognition context involving detention conditions, and analogous with the asylum case-law, a manageable recommendation would be a revised motivational duty for Member

States aiming to engage in FD 909 transfers. Rather than a *pro forma* appraisal of the social rehabilitation of the individual, transfer decisions should contain a well-founded and motivated determination of the rehabilitation prospects, including an assessment of the material detention conditions in the sought State.

In an era of European cooperation based on mutual trust, there is a question that needs to be addressed. This is whether non-compliance with international norms and standards, and even frequent and evidenced breaches of the fundamental rights enshrined in the ECHR, are an obstacle to cooperation between Member States when the transfer of mentally disordered offenders from one Member State to another is involved. This article's conclusions indicate that mutual trust is – or should be – lacking in this particular context, that there is therefore a potential risk for the Area of Freedom, Security and Justice and lastly that the recent EU initiatives fail to address this issue in an appropriate manner.

General conclusion

This research has shown that, through the various stages of criminal proceedings, mentally disordered suspects and offenders may find themselves in a – legal and substantial – quandary. The reasons for this are diverse, and often originate from a member state perspective. Nonetheless, the European Union and its deployed apparatus of mutual recognition instruments for cross-border cooperation in the Area of Freedom, Security and Justice are not without responsibility: More often than one would like to admit, these instruments hold the key to further deteriorate both the procedural and material position of a mentally disordered individual in a (cross-border) criminal context. This, in turn, could result in fundamental rights breaches as has been identified by the European Court of Human Rights in case-law on the right to a fair trial, lawful detention, the prohibition of torture, inhuman or degrading treatment and the right to life.

In the earliest stage of criminal proceedings, the prompt and adequate detection of the mental vulnerability of a suspect is of crucial importance as it will determine most if not all of the proceedings to come. Yet the research has shown that in various member states, both the legal and practical implementation of a qualitative identification is problematic. There exists no common ground, nor shared (minimum) quality standards as to who may decide as an expert – at least preliminarily – on the mental impairment of a suspect throughout the EU. Moreover, police and judicial officials, and in general most law-enforcement authorities, lack adequate training to identify and subsequently cope with mentally disordered suspects and offenders. As identified by the research, there are many reasons to believe that such under-identification, and the sometimes flawed successive approach should identification take place, leads to serious concerns regarding the right to effectively participate in the criminal proceedings against oneself, which in turn jeopardises the effectiveness and legitimacy of criminal investigations and trials. Evidence gathered with irreverence of the specific needs of a mentally disordered suspect, and trials conducted regardless of additional safeguards to establish effective participation may indeed find themselves in violation of the right to a fair trial under the standards of both National and supranational courts (the ECtHR and the European Court of Justice).

One of the main findings of this study is that both in terms of the recognition and execution of pre-trial detention (European Arrest Warrant procedures) and post-trial detention (FD 909 procedures), the instruments provide an inadequate solution to the question has to how demanded transfers and executions should be counterweighted with fundamental rights concerns in terms of the detention conditions in both the issuing and executing states. In EAW procedures, the inherent radical consequences of depriving a (innocent by law) person of liberty in remand detention awaiting a (legitimate) decision on their involvement in, and liability for, offences, are by no means counterweighted with adequate safeguards to protect these individuals against frivolously sent out Warrants. The necessity and proportionality of such a decision remains – and even more so since the recent opinion in the joint Aranyosi and Caldararu cases by Advocate General Bot – the sole prerogative of the issuing state which provides these decisions with an halo of inviolability. To make matters worse, the European Court of Justice has continuously defended the notion that the mutual recognition principle of mutual trust in the compliance of EU member states should not be hindered by serious concerns regarding this compliance in terms of detention conditions, and thusly may not result in refusals for cooperation under the EAW. Likewise, the FD 909 seems unequipped to deal with such pressing matters, even if the research showed that – by analogy – transfers of sentence execution could breach the established structural deficiencies doctrine established by both the ECtHR and ECJ. Moreover, the FD 909's rationale (and primordial purpose) to facilitate the social rehabilitation of the (mentally disordered) offender should be taken with a serious grain of salt: By allowing a non-consenting sentenced offender to be transferred to a context in which they might face substandard detention conditions and problematic compliance with the principle of equivalence of care, often by default of sufficient and qualitative information, the enhancement of the recalcitrant offender's social rehabilitation likely remains but an hypothesis. This is regrettable, because in its pure form, the instrument could provide a welcome tool to transfer sentenced persons to an actual context in which they might rehabilitate and reintegrate into society more appropriately and at quicker pace.

Likewise, and again a member state-specific issue to begin with, the deprivation of liberty and detention of mentally ill suspects (in remand) and offenders (in custody) has given – and will continue to do so – rise to various judgments before the Human Rights Court resulting in confirmed violations of the right to lawful detention (of persons of unsound mind) and even

the right to life and absolute prohibition of inhuman or degrading treatment. Specifically for mentally disordered suspects and offenders, the research has shown that their binding and enforceable right to equivalence of care (normalisation) in a detention context is often not adhered to. Even more so, one of the results of the study indicates that several member states might not pass the structural deficiencies doctrine applied by the ECtHR and ECJ in the asylum context because of their longstanding, overall and indeed structural defect to provide necessary care and treatment to mentally ill suspects and offenders deprived of their liberty.

Apart from these determinations, the research also focused on the inherent diversity of the legal doctrines of the member states. Developed through hundreds of years of sovereignty, the member states' penal systems are characterised by their own legal traditions, concepts and techniques when dealing with mentally disordered suspects and attributing criminal responsibility to them. This in itself is not an issue, but might complicate matters further when cross-border cooperation presents itself. To this extent, the application of the European Criminal Record Information System might provide necessary relieve as it – at least – allows the member states to share valuable information on i.a. a potential criminal responsibility exception and the nature of certain measures (like psychiatric admission) ordered.

The European Investigation Order, as the newest member to the mutual recognition framework, contains various elements that may further cooperation in evidence and investigative matters, whilst maintaining a proper balance between the interests and procedural rights of the persons involved. Nonetheless, the Directive EIO's sly manoeuvring to combine classic MLA features into a strict mutual recognition bodice (with the clear evidence of diminishing the relevance of a suspected person's consent with transfers and hearings, an particularly so for mentally vulnerable suspects) might turn out to be an issue. The research showed, that in dealing with mentally disordered suspects, many difficulties arise as to ascertain the quality and legitimacy of the evidence gathered. Due to be operational in 2017 and the years to come, it will be interesting to see how the Investigation Order will hold up.

For many years, mentally disordered suspects and offenders as a vulnerable category have been a blind spot for European policy makers, and member states were left to their own devices and traditions when dealing with this specific population. The two recent initiatives stemming

from the Roadmap's measure E could be seen as an indication that the European Commission seems set to embark on a noble mission to enhance the protection for this category of vulnerable defendants in criminal proceedings. In reality, however, the analysis of the instruments – the Children's Directive and the Commission Recommendation for vulnerable defendants – has shown that, at least for now, only minors involved in criminal proceedings will be the beneficiaries of this new EU endeavour. The potential dispute that was indicated in this research, based on the fact that the necessity of applying Article 82(2) TFEU to a category of defendants that, precisely because of their age, seem less likely to be involved in cross-border situations demanding of a prompt EU solution is but one critical remark. I bears repeating that the justification for this approach, through a newfound competence and/or interpretation severed from the basis provided in the TFEU, might just be the proverbial bridge too far for member states.

Another questionable tactic is to leave the *rest-category* of vulnerable defendants (i.e. adults with a mental or physical impairment) out in the cold. Admittedly the Recommendation contains a number of valuable suggestions. Indeed it proposes some minimum standards that could benefit the presumption of vulnerability for mentally disordered suspects, aid in their identification and help police and other penal authorities to deal with these suspects in a better way through advanced training, whilst also foreseeing extra safeguards in terms of hearing and interrogating the suspects through mandatory audio-visual capture of their hearings. Moreover, the Recommendation targets the need for appropriate accommodation of mentally disordered suspects in European Arrest Warrant procedures. Everything is not hunky dory however, as many qualitative and quantitative aspects remain vague and, ultimately, the Recommendation remains a bauble aimed more at appeasing critical voices rather than to actively tackle the identified widespread issues in the EU.

Extra bitter tastes the EU's rationale: the lack of binding international norms and standards dealing with (mentally) vulnerable defendants and the absence – which is faulty, because provided for in the Recommendation – of a consensus on a workable definition for them did not bring the Commission to remedy these concerns with a comprehensive instrument, but brought them the excuse needed to rest on their laurels. This is highly problematic as this is a most pressing issue, admittedly a complex one to grasp and potentially not a popular one from

a policy perspective. This notwithstanding, the current hiatus allows mentally vulnerable defendants to go under-detected and under-protected, including in cross-border proceedings. This (more) probable cross-border mobility would furthermore be more in accordance with the terms of competency embedded in Article 82(2) TFEU.

To sum up all of the research's findings in a sententious conclusion is an intricate exercise: There has been an establishment of many problematic findings on a member state level in terms of the actual, practical dealing with mentally disordered suspects and offenders. Often overlooked, repeatedly under-identified and prone to substandard quality of (forensic) expertise, this population is more often than one would like to admit confronted with serious issues in terms of effective participation and fair trial rights in the EU. Similarly, their deprivation of liberty during and after criminal proceedings is frequently characterised by substandard or maladjusted treatment and care and contrarious to the principle of equivalence of care. While primordially an issue on member state level, it was established that the mutual recognition instruments do not always provide adequate safeguards or apply a proper threshold to – at least – not further deteriorate this position. This, all things considered, is a rather piteous observation. Where the mutual recognition principle originated with the clear purpose of enhancing cooperation whilst protecting and enhancing individual rights, it now seems a safer bet for a mentally disordered individual to hope that, through this cooperation, their position and individual rights will largely remain intact.

Recommendations:

An obvious, but necessary, first recommendation is for the EU and the European Commission to step up their game and provide for an adequate instrument in the context of the Procedural Roadmap. As was identified in the first article (quo vadis), the necessity for a Directive that introduces minimum standards in terms of a presumption of vulnerability, adequate and prompt identification, criminal authorities' staff training and extra safeguards during investigative measures is likely more pressing – but perhaps less politically attractive – for mentally disordered suspects than for minors in criminal proceedings. Just as well, the competency issue to introduce minimum standards for minors in a context that does not seem that overwhelmingly cross-border (in terms of TFEU legitimacy) would not be pressing (as much) for mentally disordered suspects. The Commission's rationale that there is great diversity in the member states vis-à-vis a definition of a mentally vulnerable defendant was discarded by this research based on the determination that a) a similar observation is applicable to minors and their legal age for criminal liability and b) the fact that the Recommendation provides a workable, even defendable definition. Moreover, if diversity is what hinders the European Commission to further harmonisation and enhance cross-border cooperation, it begs the question as to what the EU has been promoting exactly in the mutual recognition framework.

While a proper Directive might resolve some of the pressing issues of identification and effective participation for mentally disordered suspects, which in turn will aid cooperation throughout the AFSJ, there is also the need to look at the mutual recognition instruments themselves.

A second recommendation is to be directed at the European Court of Justice and its role as interpreter of the mutual recognition principle: The entirety of the EU is in want of a clear vision of the Court as to how mutual recognition should interlock with fundamental rights. Having missed (or skipped) the opportunity to do so in the Radu case, all eyes are now on the Court in the joint Aranyosi-Caldararu cases. Whilst not looking to good in terms of the mutual recognition-fundamental rights equilibrium since the opinion of AG Bot, at least this time it is expressed in plain terms: That fundamental rights may not trump the effectiveness of mutual recognition. It remains to be seen whether the Court will boldly follow Bot.

A third recommendation is derived from the analysis of the European Investigation Order. This instrument, to be considered as 'le nouveau mutual recognition est arrivé', contains features that could and should be incorporated in other mutual recognition instruments. Rather than the more obvious recommendation to introduce the exact same fundamental rights threshold of the EIO in the other instruments – which, at least for the foreseeable future, will not happen since the Commission as indicated that it will not recommence the reopening of the FD EAW and the ECJ seems to be moving in the opposite direction instead – this research recommends to apply the '*less intrusive option*' doctrine of the Investigation Order on a European level. Providing the member states with an option to – at least – suggest a less intrusive alternative to a demanded decision would benefit the position of persons involved, but also the effectiveness of cooperation. To give the example of the European Arrest Warrant and the FD 909, the less intrusive option could be that the executing state, upon assessment of the Warrant or the Certificate and with due consideration of the information provided herein, promotes a less intrusive measure that will obtain the same result. Given that many Arrest Warrants are sent out (a lamentation often heard by various practitioners, for instance at the Europris Expert Group and the Academy of European Law's seminars on detention) simply to ascertain an issuing state of the presence of an individual in another state, the executing state could take notice of this and suggest an alternate to remand detention. Likewise, when a Certificate requires the execution of a sentence, at least in theory with the purpose of facilitating the social rehabilitation of the offender, the executing state could suggest an alternative measure that will achieve this purpose just as well or even better, but without resorting to the intrusiveness of a per se long-term post-trial detention. A subsequent recommendation is that in order to allow such a doctrine to be functional, the issuing state should not be allowed to blindly refuse suggestions, but in turn be bestowed with the duty to motivate its original decision and/or engage in consultation with the executing state to see whether an accordance can be achieved. The latter links back to the consultation procedure envisioned in the European Investigation Order's Directive, but also links back to the various scholars (including the referenced IRCP studies on FD 909) who promoted the idea to tighten the motivational duty of the issuing states to demand a certain measure, Warrant or Certificate

to be executed. This would still leave the issuing state its prerogative of judgement on the appropriateness (in terms of proportionality and necessity) of its decision, but would either prompt them to cogitate and motivate these decisions more profoundly in order to avoid an alternative suggestion or engage them in a consultation and exchange of information with the executing state to see what reciprocally is feasible, with consideration of the individual's position herein. The situation as it is right now, with the European Arrest Warrant and the transfer of detention sentences being used throughout the EU while their alternative counterparts the FD Supervision (entirely) and the FD Alternative (largely) remain idly by could find a solution through this recommendation. Instead of having to apply a different instrument every time a less intrusive alternative to (remand) detention presents itself, the EU could work with a Directive that introduces the less intrusive doctrine as a goal, but allows the member state to introduce this in their national laws in accordance with the specific situation of their legal system.

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This research had the purpose of taking the measure of the current (and future) arsenal of instruments within the European Area of Freedom, Security and Justice (AFSJ) that focus on European cooperation in criminal matters. For this, a selection of the relevant instruments of cooperation based on the principle of mutual recognition in criminal matters was made. This objective was then approached from the perspective of mentally disordered suspects or offenders. Starting from a dual focus – firstly the position of such suspects and offenders in these procedures and the consequences for them, and secondly the possible problems related to such persons for the instruments of mutual recognition and the consequences for an efficient and equitable cooperation – this study seeks to make both an actual (and previously unexplored) contribution to the existing legal doctrine on mutual cooperation in criminal matters, as well as build a bridge between the research fields of legal science criminology and forensic sciences. On the basis of an analysis of the relevant instruments stretching over the pre-trial, trial and post-trial phase, opportunities and problems were enumerated. In addition, attention was also paid to the broader themes of the AFSJ: the difficult relationship between fundamental (human) rights and the principles of mutual recognition, the relationship between mutual recognition and harmonization within the European criminal policy and the competence debate of the European institutions were treated and discussed through a link on the position of an accused or convicted person with psychiatric problems. Based on the results of this research, recommendations were formulated in order to improve the situation of these vulnerable persons involved, and better the cooperation in criminal matters within the European Union.